

# **NEW ISSUES IN REFUGEE RESEARCH**

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## **Rejected asylum seekers: the problem of return**

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## Introduction

During the 1990s, the return of rejected asylum seekers has become an issue of increasing concern to the discourse on migration and protection. After a final rejection in a fair and fully-fledged asylum procedure, it is held, a rejected asylum seeker should return to the country of origin or migrate elsewhere. In practice, a variety of problems persist. In a number of cases, the individual does not comply voluntarily with an order to leave state territory. When protection options are insufficient under the national law of the country where asylum is sought, there may be good reasons for such a refusal. Apart from these reasons, there may be other motives, less relevant from a protection-oriented perspective. The individual may simply not be prepared to accept that his emigration attempt has failed. Faced with a refusal to leave voluntarily, states react by threatening forcible removal and, in a second stage, by actually implementing such a threat.

Apart from unwillingness on the part of the individual, an uncooperative attitude on the part of the authorities in the country of origin may also inhibit return. Such an attitude may be fostered by political, economic or demographic considerations. Uncooperative countries of origin will deny that the rejected asylum seeker actually possesses their nationality. Alternatively, they will drag their feet when issuing the travel documents necessary for return, or they might object to the proposed modalities of return. Some returning countries react by negotiating readmission agreements. Another approach is to make the lifting of visa requirements or the granting of financial aid conditional on cooperation in readmission. Of course, all of the named approaches can be combined.

This paper attempts to present and analyse the response of returning states against the background of international law. After a general introduction, the specific approach taken by Germany is analysed. The contributions to date of the International Organisation of Migration (IOM) and the Office of the United Nations High Commissioner for Refugees (UNHCR) to the issue of return are then presented.

The overall study as well as the country-specific analysis indicates that serious doubts exist as to the efficacy, legality and legitimacy of some recent return practices. These stem largely from the lack of an overall policy on migration and protection on the regional as well as the international level. Given the problems involved in the current paradigm which is focused on control, future policies should aim at mobilising voluntary compliance of all three actors involved: returning states, countries of origin and the rejected asylum seekers themselves. Thus, the paper concludes with the following proposals:

1. Voluntary compliance by all three actors would be enhanced if the issue of return were made part of a policy package striking a balance between the interests of returning states, countries of origin and the individuals concerned. This presupposes the transparent negotiation and formulation of regional and international migration policies beyond the existing formulas of restriction, involving broader issues such as development and protection. Where migration policies can offer legal options, the illegal alternatives lose their attraction.

2. Voluntary compliance by all state actors would be enhanced, if the legal framework governing return activities would be specified. One possible means would be to elaborate interpretative guidelines for existing norms in various fields of international law. Such guidelines could be useful in bringing national practices into line with international legal obligations.
3. Voluntary compliance by all three actors would be enhanced, if a consistent monitoring of current practices by neutral and impartial actors took place. With regard to returning states, monitoring would range from the scope of protection offered under national law, the quality of decision making, the duration and conditions of detention to actual expulsion practices. With regard to countries of origin, monitoring would embrace the exercise of the right to return as well as the actual reception of the individual concerned. For reasons of credibility, such monitoring could be carried out by international organisations and non-governmental organisations (NGOs) in cooperation. The transparency attained by monitoring would benefit states as legitimising devices, while individuals would be able to put greater trust in the actual legality of state practice.
4. Returning states should persevere in the efforts to make voluntary return more attractive by reinforcing existing assistance return programmes and developing further programmes. Such efforts could involve cooperation with countries of origin, international organisations and NGOs.
5. Returning states should refrain from measures involving the risk of violating human rights. Following the maxim *in dubio mitius*, procedures should minimise intrusion when implementing enforcement measures. Countries of origin should refrain from violating their nationals' right to entry.

## **2. The Return of Rejected Asylum Seekers**

Typically, the substantial determination of an asylum claim may produce two different outcomes. A claimant is either determined to be in need of protection or not. If there is a protection need recognised by international or national law, the individual claimant will be allowed to stay. He<sup>1</sup> will be accorded some form of status, and the temporary leave to remain he was granted pending the outcome of the determination procedure becomes a residence permit. However, if no such protection need is established in determination procedures, the individual becomes a rejected asylum seeker, who is defined as follows:

The term rejected asylum seekers [...] is understood to mean people who, after due consideration of their claims to asylum in fair procedures, are

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<sup>1</sup> In this paper "he" refers to both sexes.

found not to qualify for refugee status, nor to be in need of international protection and who are not authorized to stay in the country concerned.<sup>2</sup>

Regularly, the state in question will ask a rejected asylum seeker to leave its territory.<sup>3</sup> Ideally, the individual complies with this order voluntarily, the country of origin receives him back, and the *status quo ante* is restored.

In practice, a number of problems occur at the point of return. In some cases, the individual does not comply voluntarily with an order to leave state territory. When protection options are insufficient under the national law of the country of asylum, there may be good reasons for such a refusal. Apart from these reasons, there may be other motives, less relevant from a protection-oriented perspective. The individual may simply not be prepared to accept that his emigration attempt has failed. Faced with a refusal to leave voluntarily, states tend to react by threatening forcible removal and, in a second stage, by actually implementing such removal.

Apart from unwillingness on the part of the individual, an uncooperative attitude on the part of the authorities in the country of origin may also inhibit return. Such an attitude may be fostered by political, economic or demographic considerations. Uncooperative countries of origin will deny that the rejected asylum seeker actually possesses their nationality. Alternatively, they will drag their feet when issuing the travel documents necessary for return, or they might object to the proposed modalities of return. Some returning countries react by negotiating readmission agreements. Another approach is to make the lifting of visa requirements or the granting of financial aid conditional on cooperation in readmission. Of course, all of the named approaches can be combined.

How have returning states attempted to solve the problems connected to return? Are these moves in line with international law? Are they functioning satisfactorily with a view to their aim?

The inquiry into these questions will proceed as follows. Section 2 examines the conflicting interests involved in return. Section 3 depicts activities by returning states. Section 4 sets out the legal framework provided by international law. Section 5 gives a comprehensive case study of return-related laws and practices in Germany. Section 6 gives a brief overview of the current positions and practices of UNHCR and IOM as two international organisations involved in the area of return, while section 7 offers conclusions and recommendations.

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<sup>2</sup> Memorandum of Understanding between the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), May 1997 [hereinafter MOU], para. 29. It should be noted that IOM also uses the term “unsuccessful asylum seekers”, including those persons who have chosen not to pursue an asylum claim further once it is filed. As an assessment of the various reasons leading to this choice is beyond format of this paper, the latter group is excluded from its scope.

<sup>3</sup> Provided there are no other grounds for providing a residence permit.

## **2. Conflicting Interests in Return**

### *2.1 Introductory Remarks*

The simple sketch of return problems drawn up in the introduction sufficed to expose its main actors: the returning state, the individual and the country of origin. All three have different interests. There is a fourth interest, which does not always coincide with the specific interests of the aforementioned actors. This interest turns on the development, refining and maintenance of a migratory system that takes due account of protection needs. Ideally, such a system would strike a balance between states' prerogative to control immigration and the interests of migrating individuals. In the real world, this systemic interest is partially represented by international organisations such as UNHCR and IOM. These four interests merit closer scrutiny.

### *2.2 Returning States*

Following the reasoning of affluent states, the necessity to implement return is usually motivated by reference to the integrity of migration control systems. If negative decisions in asylum procedures are not implemented, it is said, the credibility of the whole asylum system is called into question. The investment of time, financial resources and effort into the operation of complex determination procedures is only justifiable if states actually enforce negative decisions. Moreover, failure to do so could represent a "pull factor", because those with no substantive claim to protection would use asylum procedures as a way of entering the country. Thus, the credibility of the systems of migration control and of asylum protection is a primary interest of returning states.

Secondly, returning states are interested in operating their systems of migration control and asylum protection with a minimum of financial, social and political costs. Implementing return is not without cost, especially if non-voluntary methods are used by the returning state. Nevertheless, the one-off expense related to return is considered to be lower than the long-term financial costs of non-implementation. It is hard, if not impossible to verify this argument in the case of continued illegality of the rejected asylum seeker, as the costs triggered by illegality are hard to quantify. However, the situation is different if the stay of the rejected asylum seeker is legalised because, for instance, of an amnesty or the development of family ties. In such cases, the rejected asylum seeker is allowed to enter the welfare system and/or find employment. Costs and eventual benefits connected with his stay are thus more easily specified. Ultimately, this would allow for carrying out a cost-benefit analysis.

A quite different matter is a cost-benefit analysis of social costs. It is feared that non-implementation promotes the emergence of a new social strata of illegal aliens. Being beyond the protective mechanisms and benefits of the welfare state, this class would be open to exploitation, abuse and criminality.

Of course, such negative social effects can be buffered by the introduction of amnesties, which legalise the presence of certain groups of illegal aliens. Nevertheless, amnesties raise once again the question of principle as to why states

should operate determination procedures at all, if it is possible to bypass them by staying illegally for a certain period after a negative decision. While aliens staying illegally import global inequality into host societies, amnesties are an attempt to level out such inequality and to reaffirm the image of an egalitarian social organisation. However, the egalitarian logic of amnesties puts migration control at large into question.

The political costs linked to return issues are not easily determined either. If the electorate is in favour of a restrictive approach *vis-à-vis* aliens at large, it may appear attractive for politicians to implement return policies strictly. On the other hand, public acceptance for return in individual cases can be low, particularly if families with children are involved and media coverage is intense.

Until now, return has been considered a sensitive issue by politicians and administrations. While statistics on asylum applications are readily published and widely dispersed by asylum countries,<sup>4</sup> statistics on return are hard to obtain for most countries. The secrecy surrounding return is considerable, and the question must be asked whether this secrecy augments rather than decreases the political costs of return.

In spite of all return efforts, some individuals can simply not be returned, for example, for logistical reasons or because the country of origin does not readmit them. It flows from the interests of credibility and cost cutting that states will try to keep such non-returnable cases outside their territory. In this regard, safe third country mechanisms are an important tool. This concept maintains that since a substantive procedure is taking place in another state, this state will also have to deal with return questions. In the long run, safe third country mechanisms lead not only to an unequal distribution of the responsibility for protection, but also of the burden of return. Thus, seen from a Western European perspective, shifting this dual burden is certainly in the interests of potential countries of destination.

Finally, attention should also be devoted to the interest of returning states *vis-à-vis* uncooperative countries of origin. If return is especially desirable for individuals from a specific country in a short-term perspective, the returning state might feel tempted to compete with other returning states by offering greater benefits to the country of origin. However, if the returning state maintains a long-term perspective, it might cooperate with other returning states to avoid or minimise any bargaining with uncooperative countries of origin.

### 2.3 Countries of Origin

It has emerged from the previous sub-section that returning states have a strong interest in regulating the composition of their population. So do countries of origin. The latter may regard certain groups as less desirable elements of its population. Thus,

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<sup>4</sup> See for example the regularly updated statistics on asylum claims on the Internet site of the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC). Available at: <http://www.igc.ch>. Accessed 4 May 1998.

return may appear as unattractive from the point of view of the demographic policies of the country of origin as it is to countries of destination. Such considerations exist apart from their justifiability under international law. It should be recalled that a state's refusal to readmit its own citizens represents a human rights violation,<sup>5</sup> which can as such amount to persecution in the sense of Article 1 (A) (2) of the 1951 Refugee Convention.<sup>6</sup>

Something quite different is the economic interest pursued by countries of origin within the migratory framework. Expatriates may provide considerable net transfers to the country of origin. Thus, emigration is seen as something inherently positive by such countries of origin, while remigration would be something inherently negative. However, given the increasing emphasis on immediate return, it is unlikely that rejected asylum seekers will enter the labour market at all. Accordingly, rejected asylum seekers are not to be compared to expatriates.

Secondly, the country of origin may itself experience difficulties with its domestic economy. There may be problems of large-scale unemployment, obstructing the reintegration of those returned to their home society. The situation may be exacerbated by the fact that the country of origin recently underwent armed conflict or other profound crises. During the recovery phase, the return of large groups of nationals may threaten already weak stability. In such situations, countries of origin have an interest in a phased return to allow smoother reintegration.<sup>7</sup> They also have an interest in financial aid, which may mitigate the economic difficulties of reintegration, thus alleviating related social tensions.

While returning states tend to view return as an isolated problem, the solution of which is to be found in international law, countries of origin tend to put it in a wider perspective, relating it to internal stability, development policies, access to foreign labour markets, remittances and distributive justice.

#### *2.4 The Individual*

The rejected asylum seeker has invested considerable effort into his attempt to migrate and to enter a new community. Clearly, a primary interest is to succeed in this effort. Faced with a final rejection, continued – albeit illegal – residence may appear a better option than return. The choice between illegality and return is linked to the interest pursued in the migratory attempt. As can be seen below, it is precisely at this point, that returning states seek to promote voluntary return by meeting some of the overriding interests of the rejected asylum seeker.

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<sup>5</sup> See section 4.1 below.

<sup>6</sup> Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 [hereinafter 1951 Refugee Convention].

<sup>7</sup> Some readmission agreements contain provisions on phased return, limiting the number of returnees over a certain period of time. See e.g. the agreements between Germany and Vietnam and between Sweden and the Federal Republic of Yugoslavia (the latter has not yet entered into force). It should be remembered that both agreements cover not only rejected asylum seekers, but also other nationals not or no longer allowed to remain on the territory of the returning state.

During determination procedure as well as pending return, rejected asylum seekers begin to integrate into host societies. Accordingly, it is also in the interest of the rejected asylum seeker to preserve the value of his integrative efforts. Especially in cases where family ties are established, this interest can be shared with members of the host society.

Where continued illegal stay is no option, the rejected asylum seeker has secondary interests. These relate to the way return is prepared and carried out. Needless to say, it is paramount for the individual that preparation and implementation of return complies with norms for the protection of the individual in international law. In the first place, this would relate to human rights law as well as to refugee law. Moreover, the individual to be returned is interested in preserving his dignity, which makes all forms of coercion and use of force undesirable on principle.

## 2.5 Systemic Interests

Migration control and refugee protection are often described as systems. This implies that both aim at realising specific goals. In order to realise these goals, individual cases (the input) are processed according to a set of norms to produce outcomes. The systemic goal of migration control is to manage the inflow, presence and outflow of non-citizens on state territory. Migration control has been repeatedly described as a prerogative flowing from state sovereignty. Doctrine and the case law of international courts support this view.<sup>8</sup>

Any reasoning on the systemic goals of refugee protection should look back to the instrument representing the foundation of the international human rights system. In 1948, the General Assembly of the United Nations approved the Universal Declaration of Human Rights,<sup>9</sup> pronouncing in Article 14: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” Like the other civil, political, economic, social and cultural rights enshrined in UDHR Article 14 must be seen in the light of Article 28:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

This provision assigns to states (among others) the task of optimising the international order for an accommodation of the exercise of human rights. By the virtue of this article, the Universal Declaration can be seen as a starting point for the

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<sup>8</sup> In its jurisdiction on Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR], 213 UNTS 221, the European Court of Human Rights has repeatedly spelt out that states are entitled to control the entry of aliens on their territory. See e.g. European Court of Human Rights, *Nsona v. The Netherlands*, judgement of 28 November 1996, para. 92.

<sup>9</sup> Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217 A (III) [hereinafter UDHR].

development of a comprehensive human rights regime. While the 1966 Covenants<sup>10</sup> were designed to safeguard human rights under national jurisdictions, the 1951 Refugee Convention, the Convention relating to the Status of Stateless Persons<sup>11</sup> and the Agreement relating to Refugee Seamen<sup>12</sup> were conceived as secondary means of human rights protection. Broadly speaking, their rationale was to safeguard human rights, when the country of origin had failed to protect individuals under its jurisdiction.

Thus, it is important to recall that refugee protection is qualitatively different to migration control. The former is not a sub-system of the latter, as both pursue different systemic goals. However, their fields of operation overlap, and they share some norms guiding processes in each system. For instance, both systems are operated under rule of law, which means that they should produce outcomes in a predictable and non-discriminatory fashion.

The return of a rejected asylum seeker takes place at a connecting point between both systems. While an asylum claim is processed, the asylum seeker is inside the refugee protection system. After the final rejection of the claim, he passes over into the system of migration control.

The concept of dedicated two systems suggests that it is not functional if one system performs tasks which should properly be performed within the other system. By way of example, this would be the case if the refugee protection system allowed persons not in need of protection to bypass migration control. This is what is referred to when it is claimed that failure to return rejected asylum seekers endangers the credibility of the protection system.

Moreover, protection is often viewed as a scarce commodity. Accordingly, it is of interest for the refugee protection system that only those with a valid claim enter the system. As both systems draw on the same financial base, a free rider in the protection system would take resources from individuals who are in real need of protection.

Migration control and refugee protection both rely on legal norms as steering devices for their systemic processes. Some basic requirements flow from this subjugation under the rule of law: norms must be applied equally in all cases, outcomes must be predictable. Thus, equality in application and predictability would be further systemic interests.

While systemic reasoning is comparatively easy to apply on the national level, it is problematic to transpose this to the international level. What happens when different national systems of migration control and refugee protection interact in reality? Today, consistent regional and international migration policies do not exist. The degree to which control interests are allowed to interfere with protection interests

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<sup>10</sup> International Covenant on Economic, Social and Cultural Rights 993 UNTS 3; International Covenant on Civil and Political Rights, 999 UNTS 171 [hereinafter ICCPR], New York, 19 December 1966.

<sup>11</sup> Convention relating to the Status of Stateless Persons, 23 September 1954, 360 UNTS 117.

<sup>12</sup> Agreement relating to Refugee Seamen, 23 November 1957, 506 UNTS 125.

makes it hard to speak of an overarching order without simultaneously referring to its numerous contradictions.<sup>13</sup> If the credibility of refugee protection systems is endangered by the non-return of rejected cases, it is equally endangered by indiscriminate non-admission policies. While states perceive a need to do something about the former inconsistency, they seem to be prepared to accept the latter.

Nevertheless, if Article 28 UDHR as well as state rhetoric are to be taken seriously, a consistent international system interlocking migration control with refugee protection is at least an aspiration. It can serve as a yardstick for evaluating current approaches to return.

### **3. Activities by Returning States**

The final rejection of an asylum claim results in an obligation to leave the territory of the returning state. Ideally, the rejected asylum seeker leaves the country of his own free will without need for any intervention. Thus, a primary consideration of return policies is to ensure voluntary compliance. However, in case of non-compliance with the obligation to leave, returning states perceive the need to resort to legal, administrative and policing measures to secure and enforce compliance. Devising such measures is a second consideration for returning states. A third consideration is to ensure the cooperation of the country of origin – be it in the issuing of travel documents or in acceptance of the individual on its territory. A fourth consideration may be to secure the cooperation of third states in return operations, e.g. by approaching potential transit states *en route* to the country of origin.

For the purposes of this paper, return activities will be divided into:

- Activities promoting voluntary compliance.
- Activities securing the preconditions for enforcement and enforcement activities.
- Activities promoting and securing the cooperation of the country of origin.
- Activities promoting and securing the cooperation of third states.

When structuring return policies aimed at the individual, observers have traditionally distinguished between voluntary return and forced return. Keeping in mind the comparably higher economic, political and psychological costs of forced return, voluntary return is regarded as a preferred solution. Moreover, the involvement of international organisations may be dependent on the return being voluntary.<sup>14</sup> To promote voluntary return, states have used incentives (for example, benefits in the country of origin) as well as sanctions (withdrawal of benefits in the country where asylum was sought). In all, the choice between the labels “voluntary” and “non-voluntary” seems to be of considerable importance.

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<sup>13</sup> The European Union provides an excellent example. While an extensive harmonisation of control has taken place, no corresponding harmonisation of protection has been effected, resulting in serious distortions of both control and protection.

<sup>14</sup> See section 6.2 below.

However, there are problems with this ostensibly clear-cut dichotomy. At face value, it is hard to tell whether the withdrawal of basic subsistence benefits should properly be termed a sanction or an incentive. As long as the threatened sanction is not imposed, it certainly works as an incentive for conduct in conformity with the norm. Conduct appearing to be voluntary compliance may be the product of an illegitimate threat. “Voluntary” return under such conditions is certainly not to be judged in the same manner as a decision taken in the absence of such threats.

There is no authoritative legal ground for drawing a clear dividing line between voluntary and involuntary return. It must be accepted that any classification requires assessment and, accordingly, an element of politics. Defining policies as “promoting voluntary return” does not *per se* allow for any conclusions as to their acceptability from a protection perspective. Aware of the interplay between elements of persuasion, threat or force, a careful assessment of the legality of a specific return activity should be made in its individual context.

Thus, it is my understanding that return activities in all the four categories listed above are interrelated and interdependent – both with regard to the deliberations of the rejected asylum seeker and the feasibility of actual return.

### *3.1 Activities Promoting Voluntary Compliance*

Many factors may influence the attitude of a rejected asylum seeker towards return. Lack of information on prevailing conditions in the country of origin may produce a profound insecurity *vis-à-vis* return. Conversely he may be painfully conscious of the existence of various threats in the country of origin. To put it simply, the promotion of voluntary compliance turns mainly on providing information and addressing the perceived threats, as outlined in greater detail below.

The importance of information distribution is increasingly acknowledged by returning states. A number of countries have introduced counselling services on a wide range of subjects during the assessment process. Some returning states consider it important to clarify from the outset of the asylum procedure that rejection results in return.<sup>15</sup> According to such approaches, counselling starts while the application is still pending and may comprise “an early confrontation with the real chances of legally staying”<sup>16</sup> in the state where asylum is sought. Another aspect of such counselling is to inform on the availability of return assistance schemes. Finally, the return of Bosnian refugees has shown the importance of the availability of detailed information on conditions in the return area for an informed decision.

Accordingly, a return perspective is present during the whole procedure in some jurisdictions. This may place a particular strain on asylum seekers with a strong protection need. Generally speaking, it is certainly legitimate and desirable to give a proper and realistic picture of the possible outcomes of an asylum application to all applicants. However, such counselling must be carried out in a manner which avoids

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<sup>15</sup> Ministry of Justice of the Netherlands (1997), para. 2.1.

<sup>16</sup> Baumgartner (1997), p. 204.

intimidating, or, in hard cases, traumatising *bona fide* refugees. Moreover, the impression must be avoided that the return perspective is maintained to discourage the asylum seeker from pursuing his claim. From this perspective, detailed information on return assistance or conditions in the country of origin might be more properly timed *after* a final rejection.

Meeting information needs is a comparably simple and cheap measure which can be easily integrated into existing relations between authorities and the individual, but it does not exhaust the array of promotional measures available. Where various kinds of threats exist in the country of origin, the returning state can promote a positive attitude towards return by attempting to address such threats.

Threats feared by the applicant range from imminent danger to life and limb to the lack of income or employment, for instance, in a country ravaged by war. If the former type of threat emanates from anticipated persecution, generalised violence or armed conflicts, it should normally be addressed by various forms of protection in the state where asylum was sought. For the purposes of this text, it is generally assumed that asylum procedures are fair and full-fledged, which means that claims are rejected for good reasons. Nevertheless, problematic cases remain where the applicants' fear is founded on a subjective perception. In such cases, return monitoring carried out by the returning state or by other actors such as international organisations or NGOs may be able to dissolve such fears to a large extent. Such return monitoring may simply mean liaison with relevant authorities of the countries of origin. A more ambitious form would be a medium- or long-term follow up in the country of origin, be it by embassy staff of the returning state or by other actors external to the country of origin. Having said that, it should be underscored that the existence of return monitoring must never be taken as a pretext for a less scrupulous examination of asylum claims.

However, an imminent threat to life or health may also flow from the lack of proper health care in the receiving country. While such a scenario may inhibit removal in exceptional cases,<sup>17</sup> this form of threat may be alleviated by shifting health care benefits to the receiving country. By way of example, Switzerland offers necessary medical care in countries of origin for a period of six months after return.<sup>18</sup>

Benefits can also be shifted to encourage return in other ways. Some returning states offer financial incentives for return. A simple measure consists of paying the travel costs for the individual concerned. More elaborate forms comprise financial support for reintegration into the home community. Such payments create a number of problems. Returning states are anxious not to create a "pull factor" by virtue of such payments. Moreover, persons returning with financial support may face discrimination in their home community since, unlike those who have not fled, those returning have both evaded hardship and been rewarded for it. To moderate such reactions, the Swiss Government makes additional contributions to the municipality to which the individual is returning. At this stage, individual return assistance transmutes into a rudimentary form of community development, intended to improve living conditions

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<sup>17</sup> European Court of Human Rights, *D. v. UK*, judgement of 2 May 1997.

<sup>18</sup> Baumgartner (1997), p. 206.

that might otherwise lead to renewed migration pressures and/or attempts. Their focus thus shifts from the individual to the community at large.

While financial contributions may address large variety of economic threats, reinsertion into the labour market can specifically be improved through training. Successful training presupposes that the programme lasts for a certain length of time. This alternative is therefore usually reserved for cases where the person in question cannot be returned for the moment, even though there is no basis for refugee status or a long-term stay in the country where protection was sought.<sup>19</sup>

Convincing rejected asylum seekers to return is not entirely a matter of incentives. Usually, benefits offered in connection with return are linked to the gradual reduction of benefits enjoyed in the country seeking to return the individual. The compliance pressure is increased by a temporal element and a requirement of cooperation. Thus, some return benefits are on offer only until a certain time. Moreover, benefits are normally not given to asylum seekers who have refused to cooperate with authorities in matters affecting their return.

### *3.2 Activities Securing the Preconditions for Enforcement and Enforcement Activities*

As a rule, enforcement presupposes unambiguous identification of the rejected asylum seeker, the availability of travel documentation, the exhaustion of legal remedies allowing for a stay of deportation and, finally, physical presence. Moreover, factors beyond the administrative reach of returning states may play a decisive role. These issues are examined below.

Identification and documentation are necessary preconditions for both voluntary and non-voluntary forms of return. A rejected asylum seeker will only be accepted by the receiving country if some form of administrative nexus between the two can be substantiated. Thus, any form of return hinges on the establishment of the identity and, where applicable, the nationality of the rejected asylum seeker. In that respect, the expediency of return depends to a large extent on the cooperation of the individual asylum seeker. Establishing the identity and nationality of a person without his support is a difficult and tedious task. This is true regardless of whether the identity finally established is accepted as authentic by a potential receiving country. As it is not uncommon for rejected asylum seekers to lack authentic travel documents, identification often has to be complemented by requiring a passport from the authorities of the home country.<sup>20</sup> Again, this activity is greatly facilitated by the cooperation of the individual concerned.

States have developed a number of measures to address problems with identification and documentation. By way of prevention, states generally resort to the toolbox of migration control. Some states place immigration personnel at points of

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<sup>19</sup> Baumgartner (1997), p. 205 on Swiss programmes intended to preserve the social and vocational capacity for return. However, he also warns of the integrative effects such programmes may have.

<sup>20</sup> According to an official source within an intergovernmental organisation, “half of all asylum applicants in Europe arrive undocumented or with forged travel documents”.

departure or transit to detect migrants with forged or inadequate travel documentation. Others impose sanctions on carriers transporting inadequately documented aliens. This creates an incentive for carriers to conduct a more rigid documentation control, often assisted by states through training courses. These measures affect *bona fide* refugees as much as other groups of migrants, which makes their undifferentiated application questionable. Preventive control should be conducted in such a manner as to allow those in need of protection to reach the territory of potential host states. For the time being, extraterritorial document checks and carrier sanction do not fulfil that requirement. If they were systemically complemented by measures allowing for the filing of asylum claims outside the territory of countries of origin, this might change.<sup>21</sup>

Upon arrival, legislation in various states allows for asylum seekers' passports or identity documents and tickets to be confiscated. This represents a simple method of securing a return option. Taking photographs and fingerprints is another form of control, primarily used to detect multiple applications by the same applicant. Apart from its importance for the determination procedure, detecting an earlier application may also reveal the identity of the applicant.

States have also used speech analysis as a means of tracking down the geographical provenience of asylum seekers. By way of example, Sweden employs speech analysis of second languages in a great number of determination cases. The information extracted from speech analysis is primarily used for assessing the credibility of a claimant. Nevertheless, it serves also as a basis for singling out a country for return purposes. However, independent experts have seriously questioned the scientific quality and reliability of such analysis as conducted in Sweden.<sup>22</sup> The linkage between language, provenance and identity is extremely complex and difficult to grasp. Whatever value it may possess, speech analysis is not sufficiently decisive to qualify as a broadly applicable solution for identification problems.

For a variety of reasons, states have repeatedly attempted to streamline asylum procedures. It is commonly held that long procedures diminish the prospects for return, while short procedures improve them. The length of procedures and the effectiveness of review scrutiny are issues which touch upon the delicate balance between legal certainty and administrative efficiency. From a protection perspective, they give rise to concern when improvements to the latter are bought at the expense of the former. According to this logic, the first concern would be to speed up procedures by augmenting the number of qualified decision-making staff and introducing more

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<sup>21</sup> So-called reception in the region of origin has been discussed for some time without any lasting results. States have embarked on such reception forms in an *ad hoc* manner. Denmark and Sweden opened visa offices in the Croatian capital Zagreb concurrently with the introduction of visa requirements for Bosnians in the middle of 1993, allowing those Bosnians who managed to reach Zagreb to apply for Danish or Swedish entry visas. The results were encouraging. However, no attempts were made to implement such reception mechanisms beyond a case-by-case approach. On reception in the region, see generally IGC (1995).

<sup>22</sup> In early 1998, Professor Tore Jansson, Institute for Oriental and African Languages, University of Göteborg, and Professor Kenneth Hyltenstam, Centre for Research of Bilingualism, University of Stockholm, voiced strong criticism of speech analysis used in Swedish determination procedures. In letters to the directors of the State Immigration Board and the Aliens' Appeals Board and the media. The criticised form of speech analysis was carried out by *Equator*, the former language section of the State Immigration Board, now functioning as an independent enterprise and subcontractor to the determination authorities.

efficient procedures to provide accurate information on countries of origin. If carried out with the necessary dedication to quality in decision making, such measures serve the interests of asylum seekers and potential host states alike.

However, states have also resorted to limiting or removing appeal options with suspensive effect on deportation. These restrictions are usually motivated with reference to recurring “abuse” of appeals on part of asylum seekers. Such attempts can be illustrated by reference to the recent discussion on repeat claims in Sweden. Under the Swedish asylum procedure, a rejected asylum seeker may file a so-called *new claim* with the Aliens’ Appeals Board, provided that such a claim is based on facts not previously scrutinised by the authorities. In a letter to the Swedish Government, the Swedish Aliens’ Appeals Board pointed out that it is not unusual for the same applicant to file between five and ten repeat claims, while certain individuals have filed up to 30 claims. Recently, a Government Commission has proposed that new claims filed by uncooperative asylum seekers should not be processed.<sup>23</sup>

Measures of this kind raise a number of problematic issues. If the restrictions are not carefully targeted to affect exclusively those asylum seekers who use appeals procedures solely to prolong their stay, they attain the character of a collective sanction. It is not acceptable to lower legal guarantees for all asylum seekers in order to eradicate systematic manipulation in a limited number of cases. Other concerns flow from the vagueness and value judgements inherent in the concept of “abuse”. What circumstances transform an appeal from being legitimate into being abusive? While it is certainly possible to recognise extreme examples of repeat claims as abusive, they account for only a small proportion of all appeals. Recurring to the Swedish discussion, it should be pointed out that going into hiding is not equivalent to malevolent intent. The action of hiding may be motivated by reasons acceptable within the framework of asylum protection (e.g. a newly established threat of persecution in the country of origin) or by reasons irrelevant to such a framework (e.g. simply the wish to prolong one’s stay). Halting procedures in both cases affects *bona fide* refugees as much as those abusing the system. Apparently, appeal restrictions can only be bought at a high price paid at the cost of legal certainty.

As the final step in the chain of events leading to return, states seek to control the physical presence and departure of the alien. Such control may range from simple address checks and supervised departure to detention and escorted return. A variety of responses exists for checking the whereabouts of an alien. By way of example, the Dutch police conduct checks at the latest known address of the rejected asylum seeker. Similar controls can be effected by obliging the alien to report to a local authority at regular intervals. Such measures represent relatively modest intrusions on a rejected asylum seeker’s integrity, yet they allow for a rudimentary form of control. Of course, the information gained by this form of control is limited in its value. The absence of the rejected asylum seeker can be motivated by three alternatives – return, onward

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<sup>23</sup> Utrikesdepartementet (1997), p. 90ff. The following example might prove helpful. After a final rejection, a number of asylum seekers go into hiding to avoid deportation. Concurrently, they file a new claim. The Commission states that the combination of going into hiding and making a new claim gives such persons an unjust advantage over other rejected asylum seekers who do not hide. As uncooperative behaviour should put a person into a less advantageous position, it might appear logical to redress the balance by not processing new claims filed by applicants in hiding.

migration or continued illegal stay at another location in the country seeking to return the individual.

As an intermediary step, legislation in some states allows for limitations on domicile or residency. Many states choose to detain aliens facing expulsion. While this ensures maximum control, detention is the most intrusive and costly way of locating an alien. As reflected elsewhere in this text, it also raises complicated legal issues.

An escalating scale of measures exists for ensuring the actual departure of a rejected asylum seeker. A limited form of control is to order the alien to present himself at a departure point at a given date and time. Another alternative is to collect the rejected asylum seeker at his place of residence and to escort him to the point of departure.

At the point of departure, the intervention of the authorities may be limited to escort and assistance at check-in formalities or may extend to a full escort throughout the itinerary until arrival in the receiving country. Needless to say the latter measure requires considerable resources.

Detention and escorted return are, however, not the most extreme practices of immigration control. It has been reported that some countries use handcuffing or even medical sedation to overcome resistance by rejected asylum seekers who are uncooperative. Naturally, the increased intrusiveness of such measures multiplies the resulting legal problems. Moreover, in the public eye, the overt use of force in individual return cases easily brings into question the legitimacy of return programmes as a whole.

### *3.3 Activities Promoting and Securing the Cooperation of the Country of Origin*

Rejected asylum seekers' failure to cooperate is not the sole factor obstructing return. Frequently, returning states experience difficulties caused entirely by the country to which they are seeking to return the individual. The latter may obstruct the identification or documentation of individuals presumed to be its citizens, delay the issuing of travel documents, or expressly decline to readmit its nationals for various reasons.

When asked to assist in the identification of presumed nationals, potential countries of origin may react slowly due to overburdened or inadequately equipped administrative structures. The same may be true for time lags in issuing travel documents needed for return. On a political level, it can be inferred that some countries of origin handle the issue of travel documents as an informal filter for remigration, which has the function of spreading out return movements over time. This filter is all the more attractive as an outright refusal to readmit would be perceived and criticised as a breach of international law by other states. It might be added that this conduct by countries of origin in some respects mirrors the formal obstacles to free movement erected by industrialised nations which affect citizens of less affluent states.

Lack of identity papers is a by-product of the non-admission policies implemented by European states. It is most ironic that European states are now complaining about a phenomenon, the preconditions which they themselves created when they introduced control policies to which the destruction of travel documents became a rational response. This does not detract from the fact that countries of origin might bear legal responsibility for long delays in issuing travel documentation. In cases where the individual in question actually wants to return, such delays should be seen as violations of the human right to return to one's country.

Although Western European governments constantly claim that international law obliges states to take back their own citizens, some states manifestly refuse to comply with this obligation. Both in cases of informal non-compliance through administrative delays and in cases of outright refusal to readmit, the negotiation of a readmission agreement may prove to be an adequate solution.<sup>24</sup> Such agreements provide an effective tool to overcome bilateral difficulties, to reaffirm the obligation to readmit, to regulate the timing and number of returns, and to specify procedural rules. By way of example, the 1995 German-Vietnamese agreement provides for the readmission of approximately 40,000 Vietnamese citizens staying illegally in Germany.<sup>25</sup> Typically, such readmission agreements include cooperation between the country of origin and that of destination to reduce illegal presence and to discourage future illegal migration.<sup>26</sup>

Readmission agreements are usually drafted in a reciprocal fashion. The obligation to readmit is incumbent on both parties alike, regardless of the realities of migration.<sup>27</sup> In general, costs arising from readmission as far as the state borders of a requested state will be borne by the requesting state.<sup>28</sup>

It is usually underscored that returning states should not offer financial or other benefits for readmission by countries of origin.<sup>29</sup> Nevertheless, practice shows that readmission obligations are increasingly dealt with in the larger context of economic cooperation. Returning states are anxious to deny that readmission agreements with countries of origin represent a tit-for-tat exchange of individuals for assistance. They wish to avoid the impression that readmission is a service that must be bought.

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<sup>24</sup> Readmission agreements can be broadly categorised according to their personal scope. While some agreements exclusively cover nationals of the state parties, others are applicable to nationals of third countries as well. Typically, agreements with neighbouring states cover both nationals and non-nationals, while agreements with non-neighbouring states in many cases solely cover nationals of the state parties.

<sup>25</sup> See 5.2.b.

<sup>26</sup> *Ibid.*, for the effects of the German-Romanian readmission agreement.

<sup>27</sup> The German-Algerian and German-Vietnamese Agreements constitute remarkable exceptions to this rule, as they relate exclusively to the readmission of Algerian and Vietnamese nationals respectively. See section 5.2.b.

<sup>28</sup> In this respect, both the EU Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country (adopted 30 November/1 December 1994, OJ 1996 C274/1), and the Czech Draft Principles (see Working Group of the Budapest Group, *Report on the Implementation of Readmission Agreements*, Doc. No. BG11/96 C) endorse the same rules.

<sup>29</sup> Hailbronner (1996), p. 94.

However, it is openly admitted that continued cooperation in other areas of development is contingent on the fulfilment of readmission obligations.<sup>30</sup> While there is certainly a difference between a payment and a sanction, economic factors give returning states the leverage to manufacture compliance.

The current efforts of a number of European countries to return Ethiopian citizens to their country of origin may serve to illustrate this point. In December 1997, the Swedish Minister for Immigration and the Scandinavian ambassadors met the Ethiopian Minister of Foreign Affairs and a number of officials from the Ministry to discuss readmission matters. While the Ethiopian side affirmed the existence of an obligation to readmit, it was willing to receive only those who were returning voluntarily. Moreover, bilateral negotiations were preferred by the Ethiopian Government. The Ethiopian delegation referred explicitly to the readmission agreement between the Netherlands and Ethiopia, of which development contributions were an essential element.

It can be concluded that returning states choose the strategy of forming negotiating cartels to augment their influence on countries of origin. The latter, in turn, clearly prefer bilateral negotiations to maximise the benefit inherent in the linkage of readmission to development issues.

### *3.4 Activities Promoting and Securing the Cooperation of Third States*

Apart from establishing cooperative relations with countries of origin, returning states also involve third states in their quest for more efficient return policies. The latter moves are partly intended to solve specific logistical problems of transit return and partly to promote the maintenance of collectivised forms of migration control.

Logistical problems related to transit return have been addressed by specific clauses in readmission agreements. States have inserted provisions to the effect that a requested state effects an escorted return transit of a third-country national from the requesting state to the country of origin or another transit state. The costs of such return shall be borne by the requesting state, which also has to arrange for the reception in the state of destination. Transit return arrangements do not necessarily presuppose that the person to be returned has formerly passed through the territory of the requested state. The final destination of such a transit return is the country of origin. However, states seem to consider transit return over larger distances as unattractive. Affluent countries tend to prefer air transport directly to the country of origin.

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<sup>30</sup> In 1996, the Council took further steps to disseminate readmission obligations covering both nationals and third-country nationals. It laid down that the inclusion of *inter alia* a clause stipulating an obligation to readmit nationals and a clause stipulating an obligation to conclude bilateral agreement on the readmission of third country nationals with Member States which so request into future mixed agreements between the Member States of the EU and third states shall be considered when adopting the guidelines for their negotiation. Council Conclusions of 4 March 1996 concerning readmission clauses to be inserted in future mixed agreements, Doc. No. 4272/96 ASIM 6 and 5457/96 ASIM 37.

Apart from such arrangements, relatively complex attempts to create areas of collectivised migration control exist. The most notorious examples are to be found in Western Europe, namely the Schengen area and the EU. Both cooperation efforts are intended to promote the free movement of persons between the territories of member states. To abolish internal border controls, a number of so-called flanking measures have to be introduced, including reinforced checks at the common external borders. Tracking and expelling aliens staying illegally within the common territories is made a subject of the member states' collective concern. For Schengen countries, related obligations are laid down in the 1985 Schengen Agreement and the 1990 Schengen Convention.<sup>31</sup>

Article 23 of the 1990 Schengen Convention spells out the principle that an alien without permission to stay on the territory of a state party must leave the common territories without delay. The same provision obliges state parties to expel such an alien. This rule is subject to certain exemptions, including those flowing from Article 33 of the 1951 Refugee Convention.<sup>32</sup> Moreover, the Schengen Convention establishes a comprehensive information exchange by means of the Schengen Information System (SIS). Amongst other things this exchange facilitates the identification of aliens illegally staying on the territories of state parties.<sup>33</sup> The Schengen *acquis* will apply in all EU member states once the Treaty of Amsterdam, which was signed in October 1997, enters into force.<sup>34</sup>

In the EU context, return has been the subject of continued intergovernmental deliberations. These have resulted in binding as well as non-binding norms. On a binding level, the 1990 Dublin Convention contains an obligation for state parties to readmit a rejected asylum seeker who has entered the territory of another state party without being authorised to reside there, provided that it has not expelled the alien.<sup>35</sup> This obligation provides an incentive for a consistent expulsion strategy, if state parties want to avoid the responsibilities flowing from the obligation to readmit. Moreover, the draft EU External Frontiers Convention contains provisions for the escort of aliens facing expulsion to the common external borders.

Among non-binding instruments, the following have a direct bearing on return:

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<sup>31</sup> Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen, 19 June 1990, 30 ILM 84 (1991) [hereinafter Schengen Convention].

<sup>32</sup> Schengen Convention, Article 23, para. 4.

<sup>33</sup> Schengen Convention, Article 38.

<sup>34</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, 2 October 1997, OJ 1997 C340/1, [hereinafter the Treaty of Amsterdam], including a protocol integrating the Schengen *acquis* into the framework of the European Union, OJ 1997 C340/93. (Under the Protocol on the position of the UK and Ireland, these two countries may "opt in" to all or part of the Schengen *acquis*.)

<sup>35</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, Dublin, 15 June 1990, 30 ILM 425 (1991) [hereinafter Dublin Convention], Article 10 (1)(e). An identical obligation is contained in Chapter VII, Article 34 of the Schengen Convention. Chapter VII of the Schengen Convention was superseded by the Dublin Convention when the latter entered into force on 1 September 1997.

- Recommendation regarding practices followed by Member States on expulsion.<sup>36</sup>
- Recommendation regarding transit for the purposes of expulsion.<sup>37</sup>
- Addendum to the Recommendation concerning transit for the purposes of expulsion.<sup>38</sup>
- Recommendation concerning checks on and expulsion of third country nationals residing or working without authorization.<sup>39</sup>
- Recommendation concerning the adoption of a standard travel document for the expulsion of third-country nationals.<sup>40</sup>
- Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country.<sup>41</sup>
- Council Recommendation on concerted action and cooperation in carrying out expulsion measures.<sup>42</sup>

Since the content of the instruments contained in the list overlaps to a certain extent, a brief summary of norms relevant for return is given below.

A general rule spelt out repeatedly in this framework is that people found to have failed definitively in an application for asylum and to have no other claim to remain should be expelled, unless there are compelling reasons, normally of a humanitarian nature, for allowing them to remain.<sup>43</sup> Member states should make legal provisions for expulsion.<sup>44</sup> Moreover, persons to be expelled shall be informed of the expulsion decision.<sup>45</sup> If need be, the provision of an interpreter should be considered.<sup>46</sup> They should have the right to be represented and to challenge the expulsion decision.<sup>47</sup> The person in question should be expelled as soon as possible after the expulsion decision has been taken.<sup>48</sup>

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<sup>36</sup> 30 November/1 December 1992, SN 4678/92 WG11266, reprinted in Guild and Niessen (1996), p. 219.

<sup>37</sup> 30 November/1 December 1992, 19597/92 IMMIG 2 Annex F to Annex II, reprinted in Guild and Niessen (1996), p. 239.

<sup>38</sup> 1/2 June 1993. This document is attached to the preceding one.

<sup>39</sup> Brussels, 25 May 1993, SN 3017/93, WGI 1516, reprinted in Guild and Niessen (1996), p. 275.

<sup>40</sup> Brussels, 30 November 1994, OJ 1996 C274/18.

<sup>41</sup> Brussels, 30 November 1994, OJ 1996 C274/20.

<sup>42</sup> Brussels, 22 December 1995, OJ 1996 C5/2.

<sup>43</sup> Recommendation regarding practices followed by Member States on expulsion, para. 2., Recommendation concerning checks on and expulsion of third country-nationals residing or working without authorization, para. 1.

<sup>44</sup> Recommendation regarding practices followed by Member States on expulsion, para. 4.

<sup>45</sup> Ibid, para. 5.

<sup>46</sup> Ibid, para. 6.

<sup>47</sup> Ibid, para. 7.

<sup>48</sup> Ibid, para. 8.

Expulsion should normally be to the country of origin or any other country to which the individual may be admitted.<sup>49</sup> A member state, which has decided to expel a third-country national to a third country, should in principle do so without the person transiting through the territory of another member state. If the person is destined for another member state expulsion should in principle be carried out without the person transiting through the territory of a third member state.<sup>50</sup> Where there are special reasons to justify transit through another member state, (in particular, in the interests of efficiency, speed and economy), member states may ask another member state to authorise entry into its territory or transit through its territory of third-country nationals who are the subject of an expulsion measure.<sup>51</sup> Expulsion by air accompanied by transit through the transit zone of an airport should be excluded from the provisions requiring an entry and transit authorisation, so that in such cases it will be sufficient to notify the country of transit.<sup>52</sup>

Member states should also implement specific mechanisms to improve the procurement of the necessary documentation from the consular authorities of the third state to which third-country nationals are to be expelled when they lack travel or identity documents.<sup>53</sup> Moreover, member states are recommended to make use of a one-way travel document to facilitate the expulsion of persons lacking the necessary travel documents.

In addition, it is recommended that, where appropriate, member states carry out expulsions as a concerted effort with other member states,<sup>54</sup> for instance, by exchanging information on available seats on expulsion flights.

It should also be noted that the EU Council of Ministers has recommended that member states conclude bilateral readmission agreements. To guide member states in this respect, a specimen agreement has been drafted by the Council. This specimen contains provisions on readmission of persons proven or validly assumed to be nationals and former nationals.<sup>55</sup> While the readmission agreements actually concluded by member states deviate from the specimen in other regards, there is a high degree of compliance with regard to norms on the return of nationals and former nationals.

Though not directly related to return, a number of other EU initiatives improve member states' control capacities. One of the more noteworthy initiatives is the attempt to establish an EU-wide fingerprint database (EURODAC). Such a database

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<sup>49</sup> Ibid, para. 3.

<sup>50</sup> Recommendation regarding transit for the purposes of expulsion, para. 2.

<sup>51</sup> Ibid, para. 3.1.

<sup>52</sup> Addendum to the Recommendation concerning transit for the purposes of expulsion, supra note 36, para. 2.

<sup>53</sup> Council Recommendation on concerted action and co-operation in carrying out expulsion measures, para. 1.

<sup>54</sup> Ibid, para. 6.

<sup>55</sup> Specimen Agreement annexed to the Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country, Article 1, para. 1.

would enable member states to register, store and exchange fingerprints of asylum seekers, thereby impeding multiple applications under different identities. After the entry into force of the Amsterdam Treaty, it is expected that the Commission will propose a binding instrument on that issue.

Presently, the focal point for EU deliberations on return is the working group on expulsion established under the intergovernmental “third pillar” concerning justice and home affairs issues of the Treaty on European Union.<sup>56</sup> Once the Treaty of Amsterdam enters into force, a shift in the normative and institutional framework will take place. Firstly, within a period of five years, the Council shall adopt binding instruments, *inter alia* on the return of illegal residents.<sup>57</sup> This means that the existing non-binding *acquis* on return may be given a binding form in the future. Secondly, Article 67 of the Treaty of Amsterdam reframes the present *passerelle*<sup>58</sup> between the first and the third pillar of the Treaty on European Union. Member states have to decide within five years which areas of asylum and immigration should be moved from the third to the first pillar. Provided that member states indeed move return issues to the first pillar, this would subjugate such issues not only to majority vote in the Council of Ministers, but also to the jurisdiction of the European Court of Justice.<sup>59</sup>

Apart from the Schengen group and the European Union, a number of other attempts to promote cooperation between returning states exist. I mention three initiatives here: the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (hereinafter IGC), the Budapest Group, and the Nordic Consultation Group on Refugee Questions.

Since a 1992 meeting in Nyon, Switzerland, the IGC has devoted increasing attention to the question of return. In September 1994, a permanent Working Group on Return was established. The Group meets at six-monthly intervals to keep track of return-related problems and progress made with them. Amongst other activities, a list of so-called “target countries” has been drafted by the Working Group. This list contains the most common and uncooperative countries of origin. In the group of IGC participating states, a so-called lead country is chosen for each target country and given the task of promoting cooperation with that country.

The Budapest Group deals with questions of migration control and consists of states from Western, Central and Eastern Europe. It provides a forum for brokering the differing interests of countries of destination and of transit in bringing different national control systems into line with to each other. Presently, the Budapest Group operates a working group on the implementation of recommendations relating to readmission and return decided at its Prague meeting in October 1997.<sup>60</sup>

In addition to their participation in larger fora, some states find it appropriate to

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<sup>56</sup> Treaty on European Union [hereinafter TEU], 7 February 1992, OJ 1992 C224.

<sup>57</sup> Amsterdam Treaty, Article 63 (3) (b).

<sup>58</sup> TEU, Article K.9.

<sup>59</sup> Amsterdam Treaty, Article 67 (2).

<sup>60</sup> Indenrigsministeriet og Udlændigestyrelsen (1998), p. 42.

cooperate in smaller multilateral groupings as well. By way of example, the Scandinavian countries operate an inter-governmental Nordic Consultation Group on Refugee Questions. As a part of this forum, a working group on return has been established, which had its first meeting on 12 June 1997 in Copenhagen. Its current working plan comprises the following activities:

- To consider the implementation of a general plan of action *vis-à-vis* countries of origin which give rise to return problems.
- To analyse the adequacy of the establishment of readmission agreements in a long-term perspective in this context.
- To study whether there are other means of influencing the willingness of a country of origin to readmit its own citizens.
- To consider the possibility that the Nordic countries, in appropriate cases together with other European countries, may act collectively *vis-à-vis* the countries of origin that give rise to return problems (e.g. by means of collective Nordic charter flights).<sup>61</sup>

By way of conclusion, linked attempts are emerging to coordinate returning states' activities. However, this does not prevent a state faced with return problems from choosing to solve these on a bilateral basis in cooperation with the country of origin.

#### **4. The Legal Framework**

##### *4.1 The Right to Leave, the Right to Return and the Duty to Re-admit*

Legally, the return of rejected asylum seekers can be structured as three different relationships: first, the relationship between the two states involved, second, the relationship between the returning state and the individual, and third, the relationship between the country of origin and the individual. Each of these relationships can be illustrated by means of the following questions. Is the country of origin obliged to readmit a person expelled from another state? If so, is a state entitled to expel and repatriate a specific alien? Is the individual required to cooperate in the acquisition of travel documents from the diplomatic representations of the country of origin?

Which norms govern the inter-state relationship in matters of return? As a corollary flowing from their territorial supremacy, states have a qualified right to expel aliens from their territory. In order for this right to become effective, another state has to receive the person expelled. It is largely uncontested that this obligation to receive rests upon the state of which the expelled person is a citizen.<sup>62</sup> Thus, the returning state's right of removal corresponds to a duty on the part of the country of origin to readmit the incumbent. The decisive factor linking two countries in this relationship of entitlement and duty is citizenship.

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<sup>61</sup> Adopted at the Working Group meeting on 16 February 1998 in Copenhagen. Reproduced in *Indenrigsministeriet og Udlændigestyrelsen* (1998), p. 44 (translation by this author).

<sup>62</sup> Hailbronner (1996), p. 36; Plender (1988), p. 460.

The individual, however, is not merely an object of this inter-state relationship. A number of human rights instruments give him the right to leave and to return to his own country. Article 13 (2) UDHR states:

Everyone has the right to leave any country, including his own, and to return to his country.

Formulations of this right can also be found in ICCPR Article 12 (2), (3) and (4), in a number of other human rights instruments,<sup>63</sup> as well as in the case law of the European Court of Justice.<sup>64</sup> Thus, we are confronted with two rights to return. One is expressed in a claim one state has on another state. The other right to return is the individual's claim towards the country of nationality. The individual right to return concurrently reinforces and weakens the inter-state claim. In cases where an individual wishes to return to his country of origin, the latter's obligation to readmit is owed not only to the returning state, but also to the individual. In cases where the individual chooses not to make use of the right to return, this individual right cannot be invoked by the returning state to reinforce its claim *vis-à-vis* the country of origin. The question remains, does the individual's unwillingness to repatriate translate into a "right not to return" *vis-à-vis* all other states?<sup>65</sup> Indeed, the right to leave one's country would be nullified in a situation where no other state was prepared to receive the individual making use of this right.

The ideal to be realised by the right to leave and the right to return is the free movement of persons. Since these rights were conceived, the actual problem has shifted. Now, the number of states inhibiting their citizens to leave or prohibiting their return is clearly decreasing.<sup>66</sup> Instead, free movement is hampered by a parallel emergence of immigration restrictions. In this context, it should be noted that the right to leave could be interpreted in two ways. It could be read as a simple entitlement *vis-à-vis* the country of origin. Or, it could be read as an entitlement *vis-à-vis* all states.

The wording of the various texts enshrining the right to leave does not restrict it to be a claim only *vis-à-vis* the country of origin. However, it is quite clear from the analysis of the instruments' *travaux préparatoires* that states intended to preserve their control over the composition of their populations.<sup>67</sup>

As noted earlier, the right of a state to remove non-citizens from its territory has been extrapolated to produce a duty to receive by the country of origin. If the same

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<sup>63</sup> The following instruments contain provisions relating to the right to leave and the right to return: International Convention on the Elimination of Racial Discrimination, Article 5 (d) (ii) (21 December 1965, 660 UNTS 195); African Charter on Human and Peoples' Rights, Article 12 (Addis Ababa, June 1981, 21 ILM 58 (1992)); American Convention of Human Rights, Article 22 (22 November 1969, OASTS 36). A right to enter the country of which one is a national is enshrined in ECHR Protocol No. 4 securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, Article 3 (16 September 1963, ETS 46).

<sup>64</sup> Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1337 at 1351.

<sup>65</sup> In practice, countries of origin have denied readmission on the grounds that the individual was not willing to repatriate.

<sup>66</sup> Hailbronner (1996), p. 6.

<sup>67</sup> Hailbronner (1996), p. 11.

line of argument, which views a duty as correlative to a right, were applied in the field of human rights, the right to leave would produce a duty to admit. In order for the former to be effective, one has to construct the latter. The logic of inter-state international law, applied to human rights law, would exacerbate the tension between both to a degree where no reconciliation was possible. Instinctively, doctrinal writers shy away from this tension and let inter-state law override the right to leave before this tension becomes irreconcilable.<sup>68</sup>

The point made here is not that the individual right to leave should override the state's right to return, thus letting contemporary forms of migration control appear as simply illegal. Rather, it should be made clear that the resolution in the conflict of rights hinges on our initial assumptions about international law. Do state interests trump individual interests, since international law is ultimately conceived by states, not individuals? Or is the protective content of human rights law, once unleashed, beyond the logic of state interest?

Having highlighted the overarching conflict between state rights and individual rights, I return to the specific relationship between the individual to be returned and the returning state.

## *4.2 The Legality of Individual Expulsion Decisions*

### *4.2.a Introductory Remarks*

The state's right to expel an alien unlawfully present on its territory is, of course, not unfettered. By the means of human rights instruments, states have limited their sovereign rights in order to secure individual rights to all persons present on their territory.<sup>69</sup> Thus, return activities must be in conformity with states' human rights obligations. Firstly, the human rights of the alien may be compromised by risks in the country of origin. The object of assessment in this case is the responsibility of the returning state as regards such indirect human rights violations. Secondly, expulsion may also entail direct human rights violations by the returning state. This can be the case if expulsion attains a collective character or if specific expulsion practices violate human right norms.

### *4.2.b Extra-territorial Risks*

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<sup>68</sup> Ibid.

<sup>69</sup> See, e.g. ICCPR, Article 2 (1). For an attempt to condense relevant international law into a "governing rule", see Sohn and Buergenthal (1992), pp. 89-98.

An expulsion decision must conform to those norms of international law which prohibits return to certain forms of danger in the country of origin. From the point of view of the returning state, such risks are extraterritorial. However, it could be argued that it is precisely the objective of asylum procedures to assess the extraterritorial risk involved in the prohibition of *refoulement*. Nevertheless, two aspects must be observed in this context.

The first concerns the temporal difference between the final decision and actual expulsion. After a final decision in determination procedures has been taken, circumstances affecting the legality of return may change. Expulsion procedures must be sufficiently flexible to take into account the emergence of such new circumstances, allowing for the suspension of expulsion and, in appropriate cases, for the filing of a new claim. This is true notwithstanding the fact that legal remedies to that effect may be open to use in bad faith by rejected asylum seekers solely for the purpose of prolonging their stay.

Secondly, it must be recalled that the risk assessment made when determining refugee status under the 1951 Refugee Convention is not necessarily congruent with the risk assessments made under norms of human rights law. Return may expose an alien to a risk in the country of origin which is not covered by the 1951 Refugee Convention. The ICCPR, the 1984 Convention against Torture<sup>70</sup> and the ECHR all contain norms impacting explicitly or implicitly on the legality of individual return decisions with a view to extraterritorial risks.<sup>71</sup> Inasmuch as the risks addressed by human rights instruments are not taken into account when determining refugee status, expulsion procedures must be designed to perform this function and, in appropriate cases, to suspend actual removal.

#### 4.2.c *Collective Expulsion*

Given the fact that some returning countries conduct return flights by chartered aeroplanes at regular intervals, the question has arisen whether such practices constitute collective expulsion or mass expulsion contrary to human rights law. When considering the French report under Article 40 ICCPR, the UN Human Rights Committee welcomed

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<sup>70</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. No. A/Res/39/46 [hereinafter CAT].

<sup>71</sup> The most important category of such norms relates to the prohibition of torture, cruel, inhuman or degrading treatment and punishment. Article 3 (1) CAT contains an explicit norm limiting states' right to remove aliens: "No State Party shall expel, return (*'refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Both ICCPR and ECHR contain norms which do not explicitly address the removal of aliens, but have been construed by their treaty-monitoring bodies to encompass removal to a state where a claimant would risk ill-treatment. Article 7 ICCPR reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Omitting the word "cruel" contained in Article 7 ICCPR, Article 3 ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." However, the named instruments contain other norms such as the right to life, family-related rights or the right to a fair trial which also impact on the legality of removal. See Kälin (1997) for an overview of relevant case law under ECHR, ICCPR and CAT. See also Plender and Mole (1999).

the announcement made by the French delegation during the consideration of the report that the practice of deportation of groups of illegal immigrants by chartered flight to their home countries, bearing characteristics of collective expulsion, has been stopped since 1 June 1997.<sup>72</sup>

Collective expulsion is explicitly prohibited by Article 4 of the ECHR's Fourth Protocol and Article 22 (9) of the American Convention on Human Rights. Article 12 (5) of the African Charter prohibits mass expulsion, which is "aimed at national, racial, ethnic or religious groups". With regard to the African Charter, Plender has stated that there "is good reason to believe that [it] reflects a rule of modern customary law."<sup>73</sup> What, then, endows an expulsion with the quality of collective expulsion or mass expulsion?

Plender rightly states that not all expulsions *en masse* constitute collective or mass expulsions.<sup>74</sup> With regard to the expulsion of undocumented aliens, he opines that "of the principles of customary international law governing such cases, the prohibition of arbitrary conduct and the rule of proportionality are likely to prove particularly apt; reasons must be advanced which could reasonably and properly lead the expelling state to the conclusion that its action is necessary in the public interest".<sup>75</sup>

A first step to the compliance with the legal norms outlined above is a fair and fully-fledged determination procedure. Secondly, actual return practices must be neutral with regard to factors as race, nationality or religion. By way of example, a practice of returning one or a few nationalities, while refraining from action for others could fall under the concept of collective expulsion. As the inequality of treatment is based on nationality, the expulsion turns into a collective expulsion. It follows that returning states must maintain return policies which are non-discriminatory not only in law, but also in practice.<sup>76</sup>

#### 4.2.d Detention

Returning states use detention to ensure that rejected asylum seekers do not abscond before removal. As with other deprivations of liberty, detention is subjected to specific norms of human rights law. On a universal level, a pertinent regulation can be found in Article 9 ICCPR:

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<sup>72</sup> Human Rights Committee, Consideration of reports submitted by states under Article 40 of the Covenant, 1,613<sup>th</sup> mtg, 60 sess., 31 July 1997, U.N. Doc. No. CCPR/C/60/FRA/4, para. 6.

<sup>73</sup> Plender (1988), p. 476.

<sup>74</sup> Ibid, p. 459.

<sup>75</sup> Ibid, p. 475.

<sup>76</sup> See also Article 26 ICCPR.

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. [...]
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

In its General Comment 8/16, the Human Rights Committee has pointed out that this paragraph “is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”<sup>77</sup> The Committee added that

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para.1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).<sup>78</sup>

The Covenant also addresses the treatment of detainees in Article 10:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. ...

On the regional level Article 7 of the American Convention on Human Rights and Article 6 of the African Charter deal with the legality of detention. Different from the named instruments, Article 5 ECHR explicitly addresses detention and migration control:

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<sup>77</sup> General Comment 8/16 (Sixteenth session, 1982), para. 1.

<sup>78</sup> Ibid, para. 4.

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

As part of an exhaustive list of detention grounds, this norm adds further requirements to those already flowing from Article 9 ICCPR. In the case of rejected asylum seekers, detention must not only be based on law and decided in a proper procedure, but is limited to serve a narrowly circumscribed purpose. A rejected asylum seeker may only be detained when “action is being taken with a view to deportation”. Detention for other purposes than those enumerated in Article 5 (1) ECHR is thus illegal. It is therefore of importance to identify the exact content of the wording in Article 5 (1)(f). Trechsel has pointed out that the purpose of this provision is to allow for the implementation of removal.<sup>79</sup> Thus, a deprivation of liberty in order to prevent the alien from going into hiding is covered by Article 5(1)(f), as well as the deprivation of liberty inherent in forcible removal itself. Trechsel underscores that the serious intention to remove, held by the authority in question, is of decisive importance. If it turns out that actual removal cannot be performed, this does not make past detention illegal but, by the same token, it would be illegal to continue the detention in spite of the fact that removal is rendered impossible.<sup>80</sup>

This entails two conclusions. Firstly, it is illegal to detain a rejected asylum seeker, who cannot reasonably be presumed to be likely to go into hiding. It must be underscored that such an assessment must be made on a case-by-case basis. Rejection of a claim cannot automatically be equated with a risk of going underground. Accordingly, routinely detaining rejected asylum seekers does not conform with Article 5 (1)(f) ECHR. Secondly, it is illegal to detain a rejected asylum seeker, when removal proceedings have come to a halt.<sup>81</sup> This can be the case if there are legal obstacles to removal (e.g. under Article 7 ICCPR, Article 3 CAT or their regional equivalents), or if factual impediments render return impossible (e.g. if the home country declines to receive its nationals, or if it is logistically impossible to transport the individual to his country of origin).

According to a judgement by the Swiss Federal Court, the authorities must be actively pursuing removal. However, momentary problems in its implementation do not affect the legality of detention.<sup>82</sup> This means that the latter is closely linked to the prospects for actual removal in the individual case. By way of example, the outcome

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<sup>79</sup> Trechsel (1994), p. 48.

<sup>80</sup> Ibid.

<sup>81</sup> I am indebted to my colleague Jens Vedsted-Hansen for drawing my attention to this aspect of post-procedure detention.

<sup>82</sup> Swiss Federal Court, BGE 119 Ib 425 E. 4, cited in Kälin (1997), p. 34. Accord: BVerfG, NJW 1987, p. 3076.

of deliberations will be different depending on whether the authorities are awaiting a reply to an individual readmission request or whether a major political change in the country of origin is needed to allow for readmission. However, it should be underscored that the turning point is not an absolute impossibility of removal, but its improbability within a reasonable time frame.

In addition, it should be underscored that detention for the purpose of punishing the rejected asylum seeker for lack of cooperation is illegal. So is the use of detention merely to deter other aliens from exercising their right to seek asylum.

Finally, detention conditions must correspond to relevant international standards, especially those flowing from Article 7 ICCPR and its equivalents in regional instruments. Reference should also be taken to the UN Body of Principles for the Protection of All Persons under any Form of Detention and Imprisonment.<sup>83</sup> In numerous cases, asylum seekers are not separated from rejected asylum seekers in detention.<sup>84</sup> Thus, the discourse on detention conditions for asylum seekers is largely applicable to the detention conditions prevailing for rejected asylum seekers as well.<sup>85</sup>

#### *4.2.e Use of Force and Other Aspects*

Apart from detention, other activities intended to secure and implement removal also fall under the ambit of human rights norms. At all stages of the expulsion procedure, the alien must never be exposed to torture, inhuman or degrading treatment or punishment. This flows not only from Article 7 ICCPR, but also from a number of thematically focussed or regionally confined human rights instruments.<sup>86</sup> This means not only that detention conditions must be assessed with a view to such norms, but also the use of force when actually implementing removal. As the UN Human Rights Committee has noted, the ICCPR “does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied”.<sup>87</sup>

For the purposes of this text, it is perfectly sufficient to focus on the least intrusive of the measures falling under Article 7 ICCPR and its equivalents. Drawing on the case law of the European Commission and Court of Human Rights concerning Article 3 ECHR, our perception of the threshold of suffering regarding inhuman

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<sup>83</sup> UN GA Res 43/173, 9 December 1988.

<sup>84</sup> See section 5.1.g below.

<sup>85</sup> For a more recent example, see para. 26 of the 1996 Annual Report of the Committee on Civil Liberties and Internal Affairs of the European Parliament, criticising the “deplorable conditions” under which asylum seekers are kept in detention for expulsion purposes. The Parliament has requested the Committee to elaborate a specific report on that issue and to visit detention facilities in that context. Doc. No. A4-0034/98. On detention of asylum seekers in general, see UNHCR (1995). An updated edition of the latter work is currently in preparation. See also Hughes and Liebaut (1998).

<sup>86</sup> See *inter alia* Articles 1 and 16 CAT, Article 3 ECHR, Article 5 American Convention on Human Rights, Article 5 African Charter.

<sup>87</sup> General Comment 20/44, para. 4.

measures and the threshold of humiliation regarding degrading measures can, however, be refined. In the assessment of suffering or humiliation, it should be asked whether the treatment causing suffering is proportional to legitimate goals which the actor (in this case, the returning state) seeks to attain. By way of example, one might resort to cases of solitary confinement, where the additional suffering adduced by solitude has been regarded as motivated by the detainee's exceptional dangerousness. In such cases, the interests of the claimant are weighed against the interests of the state. While solitary confinement would constitute inhuman punishment for a petty thief, it has been regarded as acceptable when used against terrorists.<sup>88</sup> In other words, a particular treatment or punishment is inhuman or degrading, when the suffering or humiliation occasioned is disproportionate to the legitimate goals the actor seeks to attain by it.<sup>89</sup>

The use of force in deportation should be seen against this backdrop of its purpose, severity and proportionality. Not all use of force is illegal under Article 7 ICCPR and its equivalents, but state obligations under Article 7 ICCPR are engaged when there is no proportionality between the legitimate goal of migration control and the measures taken to achieve it. Migration control on the whole is not a goal overriding other obligations. It must be recalled that an individual removal contributes to this goal only as a fraction of total removals. Thus, the usage of handcuffs, sedative medication and other intrusive measures in removal cases can give rise to serious legal concerns. In each individual case, the suffering and humiliation it causes must be weighed against the contribution the individual's removal would make to migration control.

Apart from the use of force in removal, other circumstances can engage responsibilities under human rights law. In cases when the rejected asylum seeker suffers from physical or mental illness, detention and transport might lead to a deterioration of his health. Where his survival would be endangered, the right to life may be engaged. In cases where detention and deportation measures which would have a negative effect on health, these must be assessed against the backdrop of norms prohibiting cruel, inhuman or degrading treatment or punishment. In this context, a decision of the European Court of Human Rights provides guidance. The Court held in *D. v. UK* that the removal of the claimant who was suffering from AIDS from the UK to St Kitts and Nevis would constitute a violation of Article 3 ECHR. Crucial for this outcome was the risk facing the claimant as a consequence of the termination of medical treatment in the UK, combined with very limited medical resources in St Kitts and Nevis and his own lack of resources.<sup>90</sup>

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<sup>88</sup> Regarding the ICCPR, see General Comment 20/44, para. 6, stating that prolonged solitary confinement may amount to an act prohibited by Article 7.

<sup>89</sup> The Court also takes into account whether alternative means to pursue that goal exist: "A further consideration of relevance is that in the particular instance, the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration." European Court of Human Rights, *Soering v. UK*, judgement of 7 July 1989, Series A, No. 161, para. 111. In that case, the legitimate goal of bringing a person suspected of murder before a court could be attained by trying him in the UK. Thus, the proportionality test is further supplemented by the maxim *in dubio mitius*.

<sup>90</sup> European Court of Human Rights, *D. v. UK*, paras. 50-4.

## 5. Case Study of Germany

For many years Germany has received the largest total number of asylum claims in Europe. Since the beginning of the 1990s, a number of measures have been taken to restrict access to territory and asylum procedures, the most important being the reform of the constitutional right to asylum in 1993.<sup>91</sup> Germany is also pursuing an active return policy, as outlined below.

### 5.1 Domestic Legislation and Practice

#### 5.1.a Voluntary Departure

Pending a final decision, an asylum seeker is entitled to permission to reside (*Aufenthaltsgestattung*). This permission expires after a final and negative decision according to Section 67 (1) 6. of the Asylum Procedure Act. This, in turn, triggers an obligation to leave Germany (*Ausreisepflicht*) according to Section 41 of the Aliens' Act.

Before resorting to expulsion, the aliens authorities promote the voluntary compliance with this obligation. Practice varies between the various federal states (*Länder*). A brief overview of promotional measures in Baden-Württemberg to March 1996 is given here.<sup>92</sup>

When an asylum application is made, an information brochure on the asylum procedure is handed over to the applicant. This brochure refers also to the obligation to leave Germany following a final negative decision and points out that, in cases of non-compliance, expulsion will be ordered. In reception centres for asylum seekers, non-stop video presentations are run in various languages, informing *inter alia* on the consequences of a negative decision.

Following a negative first instance decision, an information pack is sent out in an appropriate language, informing the alien that he has to take an eventual obligation to leave into consideration, although a final decision has not been rendered. Moreover, the local asylum authorities invite rejected asylum seekers to individual counselling sessions. In these sessions, the individual is informed of the advantages of voluntary return and, where relevant, the existence of return assistance programmes. The provision of information on assisted return are regulated under section 11 of the Act on Benefits for Asylum Applicants (*Asylbewerberleistungsgesetz*).<sup>93</sup> Certain groups – such as Kurds from Turkey or Zairian nationals - are invited to an additional counselling, where they are asked whether they are willing to return voluntarily and

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<sup>91</sup> See generally Noll (1997).

<sup>92</sup> This section is based on Garhöfer (1997), p. 78. Garhöfer worked as head of the local asylum authorities in Rastatt, Germany, in 1996.

<sup>93</sup> BGBl. I (1997), p. 2022, 5 August 1997.

whether any obstacles to return exist. In a number of cases, this additional session leads to the filing of a new asylum claim.

### *5.1.b Return Assistance Programmes*

Germany operates a two-tier return assistance programme in close cooperation with IOM. Under the Reintegration or Emigration of Asylum Seekers in Germany (REAG) programme, benefits consist mainly of travel-related costs, while the Government Assisted Reintegration Programme (GARP) makes financial contributions available, which are intended to facilitate reintegration into the country of origin.

REAG was conceived in 1979 and is based on the idea that return assistance is cheaper than continued stay. It is co-funded by the federal government and the *Länder*. Amongst others, assistance under REAG is available for the following categories:

- Persons who have voluntarily withdrawn their request for asylum as a consequence of their desire to return to their country of origin.
- Persons whose asylum request has been rejected, but who are still in possession of a valid temporary residence permit.

The first category must sign a declaration to the effect that they have abstained from pursuing their claim. This declaration is part of the formal application for assistance under REAG, which comprises a return ticket, special baggage allowance, as well as additional travel allowances of up to DM 150 each in exceptional cases. REAG aims at durable return. If beneficiaries remigrate to Germany after an assisted return, IOM will demand repayment of benefits, provided there are no new causes for flight.

The second tier consists of GARP, where cash allowances are available for reintegration purposes. The amounts vary depending on the cost of living in the country of return. In 1996, GARP ranged between DM 350 (e.g. for return to Ethiopia) and DM 600 (e.g. for return to Lebanon) per adult.

Presently, GARP is available for return to Albania, Bangladesh, Bosnia-Herzegovina, Chile, Croatia, Egypt, Eritrea, Ethiopia, the Federal Republic of Yugoslavia, India, Lebanon, Mozambique, Nepal and Pakistan.

### *5.2.c Reducing Benefits*

Aliens under an obligation to leave Germany as well as tolerated aliens receive benefits under sections 1-11 of the Act on Benefits for Asylum Applicants. These benefits amount to some 80 per cent of benefits accorded under social assistance schemes for the general population. In contradistinction to the latter, payments are predominantly made in kind. Medical assistance is restricted.

In June 1998, this act was amended to reduce benefits for certain groups of aliens further. It cuts assistance for living expenses, housing and medical assistance to a minimum for aliens who are under obligation to leave Germany and for aliens without so-called “tolerated status” (*Duldung*) as provided under section 56 of the Aliens’ Act, as well as for family members of both categories if:

1. They have placed themselves under the scope of the Act in order to attain benefits according to it.
2. Measures terminating their presence cannot be taken due to reasons for which they are responsible.
3. They do not depart voluntarily, in spite of the fact that neither legal nor factual obstacles inhibit their departure to the country of origin or another country willing to receive them.

Providing that one or more of the enumerated preconditions is fulfilled, assistance according to the Act is only offered if it is irrefutably required (*unabweisbar geboten*). The decision on the grant of assistance lies with the local social welfare office, which has a considerable margin of discretion, given the vague requirement of intention in para. 1. It has been estimated that 25,000 to 30,000 persons will be affected by the amended law. Critical voices allege that the proposal represents an attempt to starve out aliens under an obligation to leave.<sup>94</sup>

#### 5.1.d Travel Documents

As previously noted, an important impediment to return is the lack of travel documents. In 1993, the Central Office for the Procurement of Return Documents was established at the Border Protection Directorate of the Federal Border Police. This office is in charge of procuring travel documents for aliens obliged to reside in reception facilities for asylum seekers. Documentation procurement for other groups of aliens is effectuated by local aliens offices.

The Central Office for the Procurement of Return Documents maintains working relations with embassies and consulates of some 110 states. Relations to some 20-30 per cent of these states are described as problematic, as the number of received documents is low and procedures are complex.

Accordingly, document procurement is started before claims have been finally decided. The asylum seeker is required to cooperate in such activities. Section 15 (2) of the Asylum Procedure Act provides that an asylum seeker shall be obliged, in particular, to:

1. Submit, deliver and leave his passport or surrogate passport to the authorities responsible for the implementation of this Act.

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<sup>94</sup> “Migration und Bevölkerung, Deutschland: Änderung des Asylbewerberleistungsgesetzes.” Available at: <http://www.demographie.de/newsletter/deutschland/asylblg2.htm>. Accessed on 28 June 1998.

2. Submit, deliver and leave all necessary certificates and any other documents in his possession to the authorities responsible for the implementation of this Act.
3. Cooperate where he does not have a valid passport or surrogate passport, in obtaining an identity document.
4. Undergo the required identification measures.<sup>95</sup>

The relevant authorities may search the alien and the items he carries, if he does not comply with his obligations under section 15 (2)(4 and 5), provided there are indications that he has such documents.

#### 5.1.e *Expulsion and Escort*

Section 49 of the Aliens' Act addresses the expulsion of aliens, stating:

- (1) An alien who is under an obligation to leave will be expelled if the obligation to leave is enforceable and there is no guarantee that it will be voluntarily complied with under Section 42, paras. 3 and 4, or if a supervised departure appears necessary on grounds of public security and public order.

[...]

Before an expulsion is actually carried out, a deportation must be announced to the alien according to Section 34 of the Asylum Procedure Act:

- (1) Pursuant to Sections 50 and 51 paragraph 4 of the Aliens' Act, the Federal Office shall issue a notification announcing deportation if the alien is not recognised as a person entitled to asylum and if he does not hold a residence authorisation (*Aufenthaltsgenehmigung*). A hearing of the alien prior to the issue of the notification announcing deportation shall not be required.
- (2) The notification announcing deportation should be issued in conjunction with the decision on the asylum application.

Section 51 of the Aliens' Act states explicitly that an expulsion to a country where the person to be expelled is threatened with persecution is prohibited. Section 53 contains further impediments to expulsion (risk of torture or death penalty, a substantial and concrete risk to life, health or freedom or if an expulsion would constitute a breach of the ECHR). Accordingly, cases rising protection issues are clearly kept apart from other expulsion cases.

In the case of legal or factual impediments to expulsion, the German legislation offers tolerated status (*Duldung*). The preconditions for this status are regulated in detail in section 55 of the Aliens' Act. According to section 56, the obligation to leave

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<sup>95</sup> Asylum Procedure Act (*Asylverfahrensgesetz*), Section 15 (2).

persists where the individual has tolerated status, but the alien will not be expelled. Tolerated status ceases after one year, if it is not revoked earlier. If it is not prolonged, immediate expulsion will be carried out without announcement or extension. This rule is modified, if the alien has had tolerated status for more than a year. In such cases, expulsion has to be announced three months in advance, provided that the willingness to accept the alien by the receiving state does not expire before this period.<sup>96</sup> According to Section 82 of the Aliens' Act, the costs for expulsion are borne by the rejected asylum seeker.

In cases where resistance is expected, the deportee is regularly escorted by two officers of the Federal Border Police. Resistance is expected in cases when the alien has committed acts of violence during his stay in Germany or he has a propensity for violence. In cases where the rejected asylum seeker may put himself or others in danger, the police officers are accompanied by a physician. Special security measures are agreed with carriers for return by air.

The use of force during expulsions has repeatedly provoked public debate. In 1994, a Nigerian national died during an air deportation. He had been tied to his passenger seat with multiple devices, was gagged and sedated. This case was the subject of a follow-up by the Special Rapporteur on extrajudicial, summary or arbitrary executions.<sup>97</sup> As a direct consequence, the Federal Border Police received orders not to use gags in future deportation practices.<sup>98</sup> Since it obstructs evacuation in emergency situations, the practice of tying deportees to their passenger seats is highly questionable.<sup>99</sup>

#### 5.1.f Statistics on Expulsion and Escort

This much is clear – expulsion is highly relevant to the return of rejected asylum seekers. In 1994, this group accounted for 66 per cent of all expulsion cases in Germany.<sup>100</sup> Apart from that, it is difficult to gather reliable statistics on expulsion and escort. Table 1 presents available data for 1992-1996.<sup>101</sup> This author could not obtain a breakdown of escort activities to the sub-group of rejected asylum seekers.

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<sup>96</sup> Aliens' Act, section 56, para. 6.

<sup>97</sup> Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories*, 53<sup>rd</sup> Sess., 23 December 1996, para. 182.

<sup>98</sup> Heinhold (1997), section 6.2.

<sup>99</sup> Recent news reports indicate, however, that this practice continues. In April 1998, a resisting Ghanaian was deported from Germany with four German escorts. He was "chained, handcuffed and tied to his seat and a crash helmet put on his head during the flight from Berlin to Accra through Moscow". *Ghana Focus*, "Four Germans Detained for Maltreating a Ghanaian", 24 April 1998.

<sup>100</sup> Holtschneider (1996), p. 72.

<sup>101</sup> Statistics: German NGO Pro Asyl, <http://www.proasyl.de/ab92.htm>, accessed on 4 May 1998; letter from the Federal Ministry of the Interior to the author, 11 July 1997.

The favoured method of return is by air. In 1996, 28,115 out of a total of 32,100 expulsions were carried out by air transport. In 1995, 3,854 deportations (or 12.74 per cent) out of a total of 30,252 deportations by air were escorted.<sup>102</sup> In 1995, costs triggered by an average forced and escorted return by air amount to US\$ 840.

#### 5.1.g *Supervised Departure and Detention*

The Aliens' Act offers two tools to facilitate expulsion. The departure of the rejected asylum seeker must be supervised under the following conditions:

- If he/she fails to leave within the time limit set for him.
- If he/she has been ordered to leave in accordance with section 47.
- If he/she is without visible means of support.
- If he/she does not possess a passport.
- If he/she has attempted to deceive the Aliens Authority by giving false information, or refused to give information.
- If he/she has made it known that he/she does not intend to comply with his obligation to leave.<sup>103</sup>

Supervised departure is also mandatory when the alien is detained or in some other form of public custody under a court order. Detention represents the second, more intrusive tool offered by the Aliens' Act and is regulated under section 57 as follows:

- (1) An alien will, on the order of a court, be taken into custody prior to deportation if no immediate decision can be made on deportation, and expulsion would be rendered unduly difficult or impossible unless he is taken into custody (preparatory detention). The duration of preparatory detention may not exceed six weeks. In the event of deportation, no further court order is required for the detention to continue until the end of the period ordered.
- (2) An alien who is under an obligation to leave will, to ensure expulsion takes place, be taken into custody under a court order (preventive detention) if:
  - The alien is under an executable obligation to leave on grounds of illegal entry.
  - The extension for departure has elapsed and the alien has changed his place of residence without notifying the aliens authority of an address under which he can be reached.
  - He has not been found at the time announced for expulsion at the place designated by the aliens authority for reasons he has to answer for.

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<sup>102</sup> These figures relate to deportations of all categories of illegally present aliens. Heinhold (1997).

<sup>103</sup> Aliens' Act, section 49 para. 3.

- He has evaded expulsion in another manner.
- There are grounds for suspecting that he will evade expulsion.

The alien can be taken into preventive detention for the maximum duration of one week, if the extension for departure has elapsed and it is certain that the expulsion can be carried out. Exceptionally, preventive detention need not be ordered, if the alien makes credible, that he will not evade expulsion. Preventive detention is not permissible if it is known that, for reasons outside the alien's control, expulsion cannot be carried out within the next three months.

- (3) Preventive detention may be ordered for up to six months. In cases in which the alien poses obstacles to his expulsion, it may be extended to a maximum of twelve months. Any periods of preparatory detention are to be included in the total duration of the preventive detention.

This provision attempts to strike an ambitious balance between the intrusion inherent in detention and the efficiency of deportation mechanisms.<sup>104</sup> While its detailed regulation could be welcomed as a contribution to predictability in expulsion matters, it should be noted that detention often hinges on a prediction as to the feasibility of expulsion. This allots a considerable margin of appreciation to the judge deciding on detention. The threshold for ordering preventive detention is rather low. As apparent from para. 2 (2), it is sufficient that the alien for whatever reason omits to communicate a new residential address to the competent authorities. Para. 2 also regulates the burden of proof: it is for the alien to show that detention is not necessary. Moreover, the wording makes clear that refraining from detention is an exceptional measure. The analysis of ECHR provisions outlined above suggests the opposite. It is for the state to justify in the individual case why detention should take place.

In matters concerning the legality of detention decisions, the principle of proportionality is applied by German courts: to attain the objective of departure, those means must be chosen that are least intrusive for the alien in question.<sup>105</sup> It has also been spelt out repeatedly in case law that the rationale of detention is not to facilitate the work of the aliens authorities.<sup>106</sup>

### *5.1.h Detention Statistics*

Since the beginning of the 1990s, there has been a marked increase in the use of detention. While 736 aliens were detained in 1992, the corresponding number for

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<sup>104</sup> For a commentary of this provision, see Göbel-Zimmermann (1997), pp. 33-6 and Wolf (1997), pp. 59-68.

<sup>105</sup> Göbel-Zimmermann (1997), p. 25, for references to German case law.

<sup>106</sup> *Ibid*, p. 33, for references to German case law.

1996 was 1,957 persons. The average duration of detention ranges from two to eleven weeks, depending on the *Länder* analysed.<sup>107</sup> As each *Land* administers detention in its own manner, statistics are generally not comparable and must be understood as rough guidelines. By way of example, the statistics are collected from prisons in the *Land* of Hessen show that in August 1995, 101 aliens were detained in Hessen. The average duration of detention amounted to 65 days for this group. The main countries of origin were Algeria (24 per cent) with an average duration of 106 days, India (19 per cent) with an average duration of 21 days, Morocco (13 per cent) with an average duration of 48 days and Poland (6 per cent) with an average duration of 48 days. Of the detained aliens 46 per cent were rejected asylum seekers, 37 per cent illegally staying aliens and 6 per cent convicts subject to expulsion, and the remainder individuals falling under one or more of these categories. The maximum duration of detention was 337 days for a rejected asylum seeker from Algeria. It should be noted that these data do not include aliens detained at police stations.<sup>108</sup>

It must be recalled that not all detentions actually end with expulsion. In a considerable number of cases, the detainee is released for legal or factual reasons (non-availability of travel documents, filing of another asylum claim). For Baden-Württemberg, releases have been estimated at some 30 per cent of all rejected asylum seekers for 1996.<sup>109</sup> This can be interpreted in two ways. Either, a large number of cases are so complex that they defy the rationality of the judge deciding on the necessity of detention. Or, such decisions are made in an overtly routine manner, without taking into account the predictable difficulties in the individual case.

### 5.1.i Conditions of Detention

Detention practices vary between the *Länder*. In five *Länder*, detainees are always separated from accused and convicts. In three, such a separation is the general rule, while four *Länder* do not maintain any separation of categories.<sup>110</sup> The latter practices give rise to concern, as rejected asylum seekers are not to be equated with convicted criminals and should accordingly be separated from them.<sup>111</sup> In most *Länder*, detention is not regulated by specific legal rules. This means that recourse must be made to rules governing penal detention, wherever those are applicable.<sup>112</sup>

Detention conditions are subject to intensive debate in Germany. In a case decided by the Municipal Court in Bremen, the court found that the detention of each of the four detainees concerned for 23 hours a day in a cell with a floor area of 2.45 square meters was incompatible with human dignity.<sup>113</sup> In another case, it emerged

<sup>107</sup> Bundesministerien des Innern und der Justiz (1996).

<sup>108</sup> Göbel-Zimmermann (1997), p. 24, based on official statistics provided by the *Land* Government of Hessen.

<sup>109</sup> Garhöfer (1997), p. 83.

<sup>110</sup> Göbel-Zimmermann (1997), p. 25.

<sup>111</sup> This follows by analogy from ICCPR Article 10 (2) a.

<sup>112</sup> Göbel-Zimmermann (1997), pp. 24, 46.

<sup>113</sup> LG Bremen 10 T 508/94, 5 August 1994, reprinted in InfAuslR 1995, 67; NVwZ-RR 1995, 297.

that detention facilities in Kehl were infested with cockroaches, and the toilet facilities bore traces of previous use. While the Freiburg Administrative Court confirmed these circumstances, it denied that they were incompatible with human dignity, on the grounds that standards were to be interpreted in the light of circumstances prevailing in the home countries of the detainees.<sup>114</sup> While constructing double standards of human dignity represents a deplorable perversion of legal reasoning, the judgement nevertheless provides an authoritative description of detention conditions prevailing at the time in Kehl.

Between 1992 and 1996, at least 18 persons committed suicide in detention.<sup>115</sup> While no simple deductions about these causalities can be drawn, the numbers are of concern to both the federal government and German NGOs

## 5.2 *Readmission Agreements*

### 5.2.a *Introductory Remarks*

All bilateral readmission agreements with so-called safe third countries, which are geographically proximate to Germany, contain provisions obliging contracting Parties to readmit their own nationals. Such agreements have been concluded with Austria,<sup>116</sup> the Czech Republic,<sup>117</sup> Denmark,<sup>118</sup> Norway,<sup>119</sup> Poland,<sup>120</sup> Sweden<sup>121</sup> and

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<sup>114</sup> VG Freiburg A 2 K 10233/96, 19 June 1996, BWVP 1996, 259; NVwZ-Beil 1997, 15.

<sup>115</sup> Bundesministerien des Innern und der Justiz (1996).

<sup>116</sup> Exchange of notes constituting an agreement between the Federal Government of Austria and the Government of the Federal Republic of Germany concerning the acceptance of persons at the frontier between Austria and the Federal Republic of Germany, 19 July 1961, 414 UNTS 211. In December 1997, a new agreement was concluded in 1997 to take account of the effects of the Dublin Convention.

<sup>117</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Tschechischen Republik über die Rückübernahme von Personen an der gemeinsamen Staatsgrenze, 3 November 1994, BGBl. 1995 II, p. 134. This agreement was supplemented by an implementing protocol, BGBl. 1995 II, p. 137.

<sup>118</sup> Exchange of notes (with annex) constituting an agreement concerning the deportation of persons from Denmark to the Federal Republic of Germany and from the Federal Republic of Germany to Denmark, 31 May 1954, BAnz. 1954, Nr. 120, 200 UNTS 53. A new agreement was concluded in 1997, to take account of the effects of the Dublin Convention.

<sup>119</sup> Agreement concerning the readmittance of persons who have illegally entered the other country, 18 March 1955, 209 UNTS 309. It should be noted that Norway is an associated member of the Schengen group.

<sup>120</sup> Protokoll über die Festlegung der technischen Bedingungen der Übergabe von Personen an der Grenze zwischen der Bundesrepublik Deutschland und der Republik Polen im Zusammenhang mit der Durchführung des Übereinkommens zwischen den Regierungen der Staaten der Schengen-Gruppe und der Regierung der Republik Polen betreffend die Rückübernahme von Personen mit unbefugtem Aufenthalt vom 29 März 1991 und des Abkommens zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen hinsichtlich der Auswirkung von Wanderungsbewegungen vom 7 Mai 1993, BGBl. 1994 II, p. 3776.

<sup>121</sup> Exchange of notes (with annex) constituting an agreement concerning reciprocal obligation to accept certain persons deported from the other country, 31 May 1954, 200 UNTS 39. A new agreement was concluded in 1997, to take account of the effects of the Dublin Convention.

Switzerland.<sup>122</sup> Such a clause is also contained in the multilateral Schengen-Poland agreement,<sup>123</sup> to which Germany is a party. It goes without saying that since citizens from these countries seldom claim asylum in Germany, the use of these provisions is low in practice. Moreover, it should be noted that the movement of persons between member states of the European Union is regulated under Article 8a of the Treaty of Rome.<sup>124</sup>

In December 1997, Germany concluded a readmission agreement with Hungary, covering the readmission of nationals of the contracting parties as well as of third-country nationals.<sup>125</sup>

Apart from these instruments, Germany has concluded a number of agreements with states in Europe, Africa and Asia covering exclusively the readmission of nationals or former nationals. These agreements are much more relevant for the German return policy. Consequently, they will be examined in more detail.

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<sup>122</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und dem Schweizerischen Bundesrat über die Rückübernahme von Personen mit unbefugtem Aufenthalt, 20 December 1993, BGBl. 1996 II, p. 945.

<sup>123</sup> Übereinkommen betreffend die Rückübernahme von Personen mit unbefugtem Aufenthalt zwischen Belgien, der Bundesrepublik Deutschland, Frankreich, Italien, Luxemburg, den Niederlanden und der Republik Polen, 29 March 1991, BGBl. 1993 II, p. 1100. Also available (in French) in Richard Plender, *Basic Documents on International Migration Law*, 2<sup>nd</sup> edn, Martinus Nijhoff, 1997, p. 863.

<sup>124</sup> Treaty of Rome 25 March 1957, as amended 31 August 1992, OJ 1992 C224.

<sup>125</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Ungarn über die Rückübergabe/Rückübernahme von Personen an der Grenze (Rückübernahmeabkommen), Budapest, 1 December 1997. BGBl II (1999) p. 90. This agreement is supplemented by an implementing protocol. On file with the author.

### 5.2.b *Bilateral Agreements with Countries of Origin*

The first group of agreements covers those countries involved in the armed conflicts in the Former Yugoslavia, namely Bosnia-Herzegovina (concluded on 20 November 1996),<sup>126</sup> Croatia (concluded 25 April 1994),<sup>127</sup> and the Federal Republic of Yugoslavia (concluded on 23 August 1996).<sup>128</sup> The large influx to Germany from these countries was a consequence of the armed conflict and human rights violations in the Former Yugoslavia. Accordingly, a common feature of these agreements is that they were drafted in the context of these flight movements.

The agreement with the Federal Republic of Yugoslavia bears witness to this context. It provides explicitly for the return of nationals whose claim for asylum has been rejected in a final decision.<sup>129</sup> Furthermore it stipulates:

In all regards, return and readmission will take place under the rules of this agreement and the protocol regarding the implementation of the agreement with full respect for the human rights and dignity of the returning persons.<sup>130</sup>

Between its entry into force and mid-1998, some 5,000 persons were returned under the terms of the agreement.<sup>131</sup> While it contains no detailed regulation for the return of persons formerly protected in Germany, the agreements with Bosnia-Herzegovina and Croatia do. Both feature detailed return plans for former war refugees which try to strike a balance between the various interests involved.<sup>132</sup>

Regarding their personal scope, all three agreements cover nationals, persons who have been issued a passport of the requested state during their stay in the

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<sup>126</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung von Bosnien und Herzegowina über die Rückführung und Rückübernahme von Personen, 20 November 1996. This agreement is supplemented by an implementing protocol. On file with the author.

<sup>127</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Kroatien über die Rückübernahme von Personen, 25 April 1994. This agreement is supplemented by an implementing protocol. On file with the author.

<sup>128</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Bundesregierung der Bundesrepublik Jugoslawien über die Rückführung und Rückübernahme von ausreisepflichtigen deutschen und jugoslawischen Staatsbürgern, 23 August 1996. This agreement is supplemented by an implementing protocol. On file with the author. Before the conclusion of the agreement and the protocol, the Yugoslav Government was not prepared to take back its citizens in the absence of a readmission agreement involving financial support from Germany. The group of citizens in Germany comprised 120,000 persons, mainly from Kosovo. It is not clear to what extent the Federal Republic of Yugoslavia abandoned the linkage of compensation to readmission during the final deliberations.

<sup>129</sup> Article 2 (1).

<sup>130</sup> Article 2 (2). Translation by this author.

<sup>131</sup> Migration und Bevölkerung, Deutschland: Änderung des Asylbewerberleistungsgesetzes. Available at: <http://www.demographie.de/newsletter/deutschland/kosovo.htm>. Accessed on 28 June 1998.

<sup>132</sup> Article 5 of the German-Bosnian agreement (stipulating a phased return based on family composition and exempting certain groups from the first phase) and Article 5 of the German-Croatian agreement (based on a geographical approach) have both triggered fierce debates.

requesting state, and persons who have lost the nationality of the requested state during their stay in the requesting state without having acquired any other citizenship.<sup>133</sup> The agreements give precedence to the 1951 Refugee Convention and the 1967 Protocol in an operative article<sup>134</sup> and include data protection measures.<sup>135</sup>

Two further Balkan countries operate readmission agreements with Germany, namely Bulgaria (concluded on 9 September 1994)<sup>136</sup> and Romania (concluded on 24 September 1992).<sup>137</sup> In 1992, both countries were amongst the top ten countries of origin of those seeking protection in Germany. The number of Bulgarian asylum seekers dropped from 31,540 in 1992 to 3,367 in 1994. When the agreement was concluded in September 1992, some 12,000 Bulgarian citizens were present in Germany without any authorisation. Concerning Romanian protection seekers, German authorities registered 103,787 cases in 1992, 73,313 cases in 1993, 9,581 cases in 1994 and 3,522 in 1995.<sup>138</sup> In 1993, the year after the conclusion of the readmission agreement, some 35,000 Romanians were repatriated by air after an accelerated procedure had been implemented. In 1994, the equivalent number amounted to 25,363 persons.<sup>139</sup> It would go too far to establish causality between the conclusion of readmission agreements and a decreasing number of claims. Suffice it to say that their relation does not appear to be purely coincidental.

The above-mentioned agreements with Bulgaria and Romania are by and large identical. Both provide for the return of nationals. Unlike the Romanian agreement, the Bulgarian agreement also covers former citizens who have been released from citizenship of the requested state without having received a confirmation of naturalisation from the requesting state.<sup>140</sup> Citizenship must be proven or made credible as a precondition to readmission under both instruments.<sup>141</sup> Finally, both

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<sup>133</sup> German-Bosnian agreement: Articles 1 (1), 2 (1); German-Croatian agreement: Article 1 (1) and 2 (1) and Article 1 (6) of the Protocol; German-Yugoslav agreement: Article 2 (3) and (4).

<sup>134</sup> German-Bosnian agreement: Article 11 (1); German-Croatian agreement: Article 8 (1); German-Yugoslav agreement: Article 10 (1).

<sup>135</sup> German-Bosnian agreement: Article 7 and Article 5 of the Protocol; German-Croatian agreement: Article 7 and Article 4 of the Protocol; German-Yugoslav agreement: Article 6 and Article 7 of the Protocol.

<sup>136</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Bulgarien über die Rückübernahme von deutschen und bulgarischen Staatsangehörigen, 9 September 1994, BGBl. 1995 II, p. 100. This agreement is supplemented by an implementing protocol, BGBl. 1995 II, p. 102.

<sup>137</sup> Vereinbarung zwischen dem Bundesminister des Innern der Bundesrepublik Deutschland und dem Innenministerium von Rumänien über die Rückübernahme von deutschen und rumänischen Staatsangehörigen, 24 September 1992, BGBl. 1993 II, p. 220. The agreement is supplemented by an implementing protocol, BGBl. 1993 II, p. 222.

<sup>138</sup> Bundesministerium des Innern (1994), p. 7; Eurostat, *Theme 3, Population and Social Conditions, Series B, Short-term Statistics, Asylum Seekers*, 1/1996, p. 6.

<sup>139</sup> Reermann (1997), p.128.

<sup>140</sup> German-Bulgarian agreement, Articles 1 (1) and 2 (1). According to official German sources, Romania obstructed return of this group. Bundesministerium des Innern (1993), p. 64.

<sup>141</sup> German-Bulgarian agreement, Articles 1 (1) and 2 (1); German-Romanian agreement, Articles 1 (1) and 2 (1).

agreements contain an article giving precedence to the 1951 Refugee Convention and the 1967 Protocol.<sup>142</sup> Neither agreement contains data protection provisions.

On 21 July 1995, Germany and Vietnam concluded a readmission agreement,<sup>143</sup> which provides for the return of approximately 40,000 Vietnamese citizens staying illegally in Germany. A protocol and an exchange of notes relating to this agreement stipulate rules for its implementation.<sup>144</sup> A large proportion of the group to be returned consisted of Vietnamese workers invited by the former German Democratic Republic. Vietnam was not prepared to readmit its citizens without compensation. The agreement was part of a larger assistance package deal worth DM 200 million. For the reintegration of the returnees, DM 16 million was allocated, of which each country provided DM 8 million. According to German government sources, the implementation of the agreement was obstructed by the Vietnamese authorities in the first months after its entry into force, which strained relations between the two states.<sup>145</sup>

Unlike the reciprocal provisions of the vast majority of readmission agreements, this instrument regulates exclusively the return and readmission of Vietnamese nationals. Their nationality can either be proven or made credible.<sup>146</sup> For the period 1995-1998, yearly quotas for returnees are stipulated. By the turn of the century, the whole group of 40,000 is to be repatriated.<sup>147</sup>

Interestingly, the exchange of notes contains a section according to which the German authorities will first seek to return Vietnamese citizens who have entered Germany through neighbouring states to those states, provided that they have concluded a readmission agreement with Germany and are under an obligation to readmit them. Thus, a certain share of the burden of returnees is shifted onto the neighbouring states.

While the agreement contains a clause on data protection,<sup>148</sup> no article provides for the precedence of instruments of international refugee law. Article 1 (2) stipulates simply that return is not dependent on the consent of the persons to be returned, and that the obligation to readmit also covers persons returned against their will. Article 1

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<sup>142</sup> German-Bulgarian agreement, Article 4 (1); German-Romanian agreement, Article 3.

<sup>143</sup> Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Sozialistischen Republik Vietnam über die Rückübernahme von vietnamesischen Staatsangehörigen, 21 July 1995, BGBl. 1995 II, p. 744.

<sup>144</sup> Protokoll zur Durchführung des Abkommens vom 21 July 1995 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Sozialistischen Republik Vietnam über die Rückübernahme von vietnamesischen Staatsangehörigen, 21 July 1995, BGBl. 1995 II, p. 748.

<sup>145</sup> For 1995, a quota of 2,500 cases was set. In 1996, a quota of 5,000 cases should have been returned. Until May 1996, not a single case has been returned. From 8145 applications for return by German authorities, Vietnam had accepted 287. *Süddeutsche Zeitung*, 15/16 May 1996. In July 1996, after a diplomatic row between Germany and Vietnam on the implementation of the agreement, 64 persons had been returned under the agreement. *Frankfurter Allgemeine Zeitung*, 2 July 1996.

<sup>146</sup> Article 5 of the agreement.

<sup>147</sup> Article 4.

<sup>148</sup> Article 9.

(3) states that both parties are obliged to carry out return in an orderly way with regard to the safety and human dignity of the persons concerned.

In the exchange of notes, Vietnam declared that it would abstain from prosecuting returnees for their unauthorised exit from Vietnam and their unauthorised stay in Germany.

The readmission protocol concluded between Germany and Algeria<sup>149</sup> likewise covers exclusively the return of Algerian nationals. The parties have agreed in an exchange of notes that the protocol will be provisionally applied as of 15 May 1997.<sup>150</sup>

A precondition to readmission under the protocol is that Algerian nationality must be proven or made credible.<sup>151</sup> The means to that end are dealt with in detail, as is the procedure to be followed when making and answering readmission requests.<sup>152</sup> The returnee is to be sent by air, accompanied when necessary by specialised German and Algerian security personnel.<sup>153</sup> From the German side, the participation of Algerian police in guarding return flights has been noted with satisfaction: “Given the steadily increasing number of recalcitrant Algerian returnees, this is of great importance in practical terms and in respect of media publicity.”<sup>154</sup>

While data protection measures are included,<sup>155</sup> no reference is made to international refugee law or human rights instruments.

## 6. The Current Position of International Organisations

### 6.1 UNHCR

UNHCR was set up for the protection and assistance of refugees as defined in the organisation’s Statute. Once a person is determined not to be a refugee after a fair and fully-fledged procedure, he falls outside the mandate of UNHCR. Therefore, it was stated in the 1990 *Note on International Protection* that, while UNHCR should not be involved in the enforcement of return decisions, it “could, if so requested by the Secretary-General or the General Assembly and, in co-operation with other

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<sup>149</sup> Protokoll zwischen der Bundesrepublik Deutschland und der Demokratischen Volksrepublik Algerien über die Identifizierung und die Rückübernahme von algerischen Staatsangehörigen, 14 February 1997. On file with the author.

<sup>150</sup> Exchange of notes between the Ambassador of the Democratic and Popular Republic of Algeria and the State Secretary of the Federal Ministry of the Interior of the Federal Republic of Germany of 14 February 1997. On file with the author.

<sup>151</sup> Article 1 of the protocol.

<sup>152</sup> Articles 1-5.

<sup>153</sup> Article 4 (1) and (3).

<sup>154</sup> “Dies ist angesichts der stetig zunehmenden Zahl renitenter algerischer Schüblinge von enormer praktischer und medienöffentlicher Bedeutung.” Letter of 18 February 1997 from the Federal Ministry of the Interior to the Ministers and Senators of the Interior of the *Länder*. Translation by this author.

<sup>155</sup> Article 8.

appropriate agencies, assume responsibilities outside [its] traditional mandate but compatible with [its] strictly humanitarian competence, to co-ordinate the safe and dignified return of rejected asylum-seekers”.<sup>156</sup>

Since 1990, the position on return has evolved further. In 1997, the Standing Committee concluded that if the organisation’s “involvement with return can be shown directly or indirectly to contribute to the fulfilment of its protection and solutions responsibilities [*sic*] stemming from UNHCR’s Statute, there is no overriding mandate obstacle to involvement”.<sup>157</sup> A critical observer will note that an indirect link to protection can easily be constructed, provided that one declares return to be crucial for the maintenance of asylum systems. Given the level of abstraction of such arguments, it has to be asked where exactly the scope of the mandate ends. In the same document, a number of criteria for involvement are set out:

- (i) the involvement of the Office must be fully consistent with its humanitarian mandate to protect refugees;
- (ii) return is recognized as being primarily a bilateral matter between the countries concerned and UNHCR’s role is a supportive one, ideally as part of an inter-agency arrangement.

[...] Furthermore, UNHCR’s protection responsibilities require that the Office’s involvement be preceded by its determination that there is no valid protection reason why a group of individuals should not be required to return, and that UNHCR involvement is beneficial to protecting individuals and the institution of asylum.<sup>158</sup>

Accordingly, UNHCR involvement with return programmes “would have to be preceded by a cost/benefit analysis for UNHCR” and be on an “exceptional rather than routine basis”, which gave precedence to “another agency already active or better suited and able to undertake the necessary activities”.<sup>159</sup> Given these preconditions, UNHCR involvement has in practice been limited, although some affluent states have signalled that they would welcome a more active involvement of UNHCR in return programmes.<sup>160</sup>

UNHCR has nevertheless become involved in a number of return programmes. For instance, under the Comprehensive Plan of Action, UNHCR was from 1989 given responsibility for monitoring the situation of persons returning from South East Asian countries to Vietnam, among them rejected asylum seekers. These activities were based on a request by the UN Secretary-General.

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<sup>156</sup> Executive Committee of the High Commissioner’s Programme, *Note on International Protection* (submitted by the High Commissioner), 27 August 1990, UN GAOR A/AC.96/750, para. 26 (xi).

<sup>157</sup> Executive Committee of the High Commissioner’s Programme, Standing Committee, *Return of Persons Not in Need of International Protection*, 30 May 1997, EC/47/SC/CRP.28, para. 15.

<sup>158</sup> *Ibid.*, paras. 15 and 16.

<sup>159</sup> *Ibid.*, para. 18.

<sup>160</sup> Executive Committee of the High Commissioner’s Programme, Standing Committee, *Composite Flows and the Relationship to Refugee Outflows, Including Return of Persons Not in Need of International Protection, as Well as Facilitation of Return in its Global Dimension*, 25 May 1998, EC/48/SC/CRP.29, para. 15.

Moreover, UNHCR has assumed a passive monitoring role under the bilateral return activities from Switzerland to Sri Lanka. These activities are based on a readmission agreement concluded in 1994 between the two countries, which regulates the return of rejected asylum seekers from Switzerland. UNHCR is requested to liaise between the returnees and both countries. In addition, each returnee is given a document containing including UNHCR contact details. Should the returnee experience personal security problems, he can contact UNHCR, which in turn would seek clarification or intervene with the competent Sri Lankan authorities. This cooperation started in 1994 and continued in 1995.

Among the measures which UNHCR could take, the Standing Committee has named information exchange and distribution on the situation in the country of origin as well as taking a public stand on the acceptability of return of particular rejected groups. Moreover, it stated that UNHCR could act as a catalyst for return by facilitating inter-state dialogue, counselling national entities and by contributing to limited reintegration activities.<sup>161</sup>

Following the logic of the mandate, a key criterion for any UNHCR involvement is the quality of determination procedures leading to rejection. If persons screened out in national determination procedures indeed merit international protection, UNHCR would directly contravene its mandate if it assisted their return. In consequence, any involvement presupposes close monitoring of determination procedures in the returning state. In addition, determination procedures could be affected negatively if decision-makers misunderstood the involvement of UNHCR to mean that the country of origin is generally safe.

An increased involvement with return would involve UNHCR entering the wider field of migration management. The organisation would be caught in state-like dilemmas, having to balance protection functions and migration control. Moreover, migration control has its own dilemmas, one of them being the opposed interests of returning states and countries of origin.

## 6.2 IOM

IOM operates assisted return programmes, which offer unsuccessful asylum seekers and other irregular migrants an opportunity to return in dignity to their country of origin.<sup>162</sup> Such bilateral programmes are designed in collaboration with returning states and have been established with European states (Belgium, Germany, the Netherlands, Hungary and Switzerland), as well as in Asia (where the beneficiaries are unsuccessful asylum seekers from Vietnam in various host countries).<sup>163</sup> In the case study on Germany above, one of these bilateral programmes has been presented at some length.

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<sup>161</sup> Executive Committee of the High Commissioner's Programme, Standing Committee, *Return of Persons Not in Need of International Protection*, para. 19.

<sup>162</sup> IOM, *Report of the Director General on the Work of the Organization for the Year 1996*, MC 1896, para. 145.

<sup>163</sup> *Ibid*, paras. 145 and 189.

What are the legal ramifications of these activities? According to Article 1 of the IOM Constitution, one of its purposes and functions is “to provide services ... for voluntary return migration, including voluntary return”.<sup>164</sup> The express requirement of voluntariness was introduced into the Constitution in 1989. In the original Constitution, this requirement was implied in Article 2(b) of the Constitution which stipulates as a requirement for membership “a demonstrated interest in the principle of free movement of persons”.<sup>165</sup> It follows that any IOM involvement in the return of rejected asylum seekers presupposes voluntariness on behalf of the returnee.

This becomes particularly clear in the stance IOM takes on return systems for irregular migrants, of which rejected asylum seekers are a sub-group. In the view of IOM, such systems should provide for two options:

- Assisted voluntary return, through IOM, for which the migrant may opt should it be available and offered to him/her.
- Forced return by government authorities, under national law enforcement procedures, if the person does not leave the country by his/her own means or under IOM auspices before the deadline for return.<sup>166</sup>

This return is questioned by some affluent IOM member states. At the seventy-fourth session of the IOM Council in 1997, Australia proposed a re-examination (not taken up later on the intergovernmental Working Group on IOM’s constitutional amendments in early 1998) of Article 1 of the IOM Constitution which allows IOM to engage in voluntary returns only. At the same meeting, Germany pointed out that involuntary returns should remain an option on a case-by-case basis, taking into account all relevant factors including possible IOM involvement in such return procedures.<sup>167</sup>

How, then, does IOM define the decisive criterion of voluntariness? The organisation “considers that voluntariness exists when the migrant’s free will is expressed at least through the absence of refusal to return, e.g. by not resisting boarding transportation or not otherwise manifesting disagreement. From the moment it is clear that physical force will have to be used to effect movement, national law enforcement authorities would handle such situations”.<sup>168</sup> Elsewhere, IOM acknowledged that “there is often no sharp and clear-cut distinction between forced and voluntary migration”. As stated earlier in this paper, the same goes for forcible return as opposed to voluntary return. For operational reasons, a cut-off point must be identified on the sliding scale between the two extremes. This is perfectly understandable.

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<sup>164</sup> IOM Constitution, Article 1 (1) (d).

<sup>165</sup> IOM, *Return Policies and Programmes*, 5 November 1997, MC/INF/236, para. 6.

<sup>166</sup> *Ibid.*, para. 8. IOM has made it clear that the organisation will not assume responsibility for transport arrangements for forcibly returned persons.

<sup>167</sup> 74th session of the IOM Council, Geneva, 25-26 November 1997, *Summary of Proceedings*, para.46.

<sup>168</sup> IOM, *Return Policies and Programmes*, 5 November 1997, MC/INF/236, p. 2, footnote 3.

Two aspects of the definition of voluntary return deserve greater attention. First, it is clear that the definition focuses on a physical manifestation of will, namely, physical movement without the returnee showing resistance. It can be objected that the returnee may be unaware of the significance of his entering the means of transportation without resistance. The absence of resistance may be because the return is voluntary, but it might also be a result of intimidation or coercion. Instead of interpreting physical movements, greater clarity could be attained if the return candidates were asked to express whether their return is voluntary or not.

Second, the definition disregards the fact that factors unacceptable under international law may have contributed to the decision of the returnee. Where detention conditions contravene Article 7 ICCPR, one cannot properly speak of a choice between voluntary or non-voluntary forms of return. Coercion has taken place long before the returnee boards a plane or other transportation. Thus, it is necessary to consider whether the definition of voluntariness could be refined by criteria focussing on factors preceding embarkation.

### *6.3 Cooperation between UNHCR and IOM*

In May 1997 UNHCR and IOM signed a Memorandum of Understanding, dealing with the operational modalities of inter-agency cooperation. The Memorandum covers activities including those for the benefit of rejected asylum seekers. Concerning this group, IOM and UNHCR take the view that the return and readmission of such persons should only be considered when the asylum seeker has exhausted all possibilities to be allowed to stay.<sup>169</sup> Both organisations declare themselves willing to support states, under certain conditions, in their efforts to return this group. According to the named preconditions for support, such returns

- should not involve measures conflicting with the humanitarian concerns of either organisation;
- should take into account the best interests of the individuals concerned;
- be recognised as being primarily a bilateral matter between the countries concerned.<sup>170</sup>
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## **7. Conclusions and Recommendations**

Legal, political and pragmatic disputes linked to the return of rejected asylum seekers are ultimately fed by the basic conflict between a liberal protective paradigm and a control paradigm. Broadly speaking, the liberal protective paradigm favours free movement, individual interests and voluntary decisions, while the control paradigm prefers control over the composition of populations, collective interests and, if need

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<sup>169</sup> UNHCR/IOM, *Memorandum of Understanding*, para. 29.

<sup>170</sup> *Ibid*, para. 12.

be, enforcement. This conflict becomes apparent in the whole range of legal disputes in the field, ranging from the disputed right not to return to the difficulties which IOM and UNHCR have in reconciling specific return activities with their mandate.

On the whole, the legal framework offered by international law is sufficiently ambiguous and abstract to accommodate both perspectives. Being the product of conflicting interests, it offers no guideline as to the preference of one paradigm over another, although norms have developed asymmetrically. While regional restrictions on free movement have multiplied in later years, the liberal protective paradigm has been caught in a defensive and repetitious reference to a limited series of rather abstract legal norms. Given these preconditions, it is clear that an extended involvement of international organisations in the return activities of affluent states must be perceived as giving in to the pressure exerted by proponents of the control paradigm.

Lacking balances, the control paradigm multiplies itself in a number of distorted mirror-images. Affluent countries' visa requirements and carrier sanctions find their counterpart in the denial of travel documents by the countries of origin. The increase in human trafficking, itself a by-product of policies increasingly restricting territorial access, is reflected in current tendencies to involve non-state actors in return. And, finally, the miserable living conditions in some countries of origin are reproduced in harsh detention conditions in affluent states.

In the end, enforcing compliance has its limits and control merely shifts the arenas of conflict. Ultimately, this calls into question the long-term efficacy of repressive solution attempts. Moreover, enforcement is expensive. While Germany may have the means to conduct large-scale expulsions by air, less affluent countries simply cannot afford such policies.

Apart from the question of efficacy, the legality of certain practices of involved states is in serious doubt. In the case of sending states, intrusive measures such as detention and forcible expulsion are particularly prone to produce violations of human rights. In that of countries of origin, human rights obligations are infringed when nationals are denied the right to return.

Repeated violations of norms may indicate that the latter are insufficiently legitimised. Returning states have only reluctantly started to examine the problem of return publicly. Vital information for informed decisions is still classified or never collected. The public, in turn, reacts negatively to population control bought at the price of violent expulsions. Legitimacy is further weakened by the lack of neutral and independent monitoring.

What, then, could be done to improve efficacy, legality and legitimacy? Given the problems associated with the control paradigm, future policies should aim at mobilising the voluntary compliance of all three actors involved.

1. Voluntary compliance by all three actors would be enhanced if the issue of return were made part of a policy package striking a balance between the interests of returning states, countries of origin and the individuals concerned. This would presuppose the transparent

negotiation and formulation of regional and international migration policies, beyond existing formulas of restriction and involving broader issues such as development and protection. Where migration policies can offer legal options, the illegal alternatives lose attraction.

2. Voluntary compliance by all state actors would be enhanced, if the legal framework governing return activities were specified. One possible means would be to elaborate interpretive guidelines for existing norms in various fields of international law. Such guidelines could be useful for bringing national practices into line with international legal obligations.
3. Voluntary compliance by all three actors would be enhanced, if there were consistent monitoring of current practices by other neutral and impartial actors. With regard to returning states, monitoring would range from the scope of protection offered under national law, the quality of decision making, the duration and conditions of detention to actual expulsion practices. With regard to countries of origin, monitoring would embrace the exercise of the right to return as well as the actual reception of the individual concerned. For reasons of credibility, such monitoring could be carried out by international organisations and NGOs in cooperation. The transparency attained by monitoring would benefit states as legitimising devices, while individuals would be able to put greater trust in the actual legality of state practices.
4. Returning states should persevere in their efforts to make voluntary return more attractive by reinforcing existing assistance return programmes and developing further programmes. Such efforts could involve cooperation with countries of origin, international organisations and NGOs.
5. Returning states should refrain from measures which risk violating human rights. Following the maxim *in dubio mitius*, procedures should minimise intrusion when implementing enforcement measures. Countries of origin should refrain from violating their nationals' right to entry.

TABLE 1. EXPULSIONS AND ESCORTED EXPULSIONS FROM GERMANY

<b>Year</b>	<i>Expulsions of rejected asylum seekers</i>	<i>Expulsion – all categories</i>	<i>Number of escorted aliens – all categories</i>	<i>Number of escorts – all categories</i>
1992	10,798	20,846	4,700	3,611
1993	36,165	64,920	8,904	5,197
1994	36,183	60,452	10,149	7,670
1995	21,487	66,149	Data unavailable	Data unavailable
1996	15,653	59,010	Data unavailable	Data unavailable

(Berlin not included)

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